




*This Book
Does Not
CIRCULATE*

Copy 1

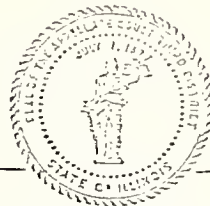
RECEIVED APR 1 1976



Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

STATE OF ILLINOIS

People vs. Tony McClain



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present—

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
June 11, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of the Tenth
Plaintiff-Appellee	)	Judicial Circuit,
	)	Peoria County.
vs.)	
)	
TONY McCLAIN,	)	Honorable
	)	Richard E. Eagleton
Defendant-Appellant	)	Presiding Judge

PER CURIAM

Abstract

Tony McClain was indicted with the offense of possession of a controlled substance in violation of Illinois Revised Statutes, 1973 Chapter 56 1/2, § 1402(b). After trial by jury, he was convicted as charged, and after presentence report and sentencing hearing, he was sentenced to a term of imprisonment of not less than one (1) nor more than four (4) years.

A timely notice of appeal was filed and this court appointed the office of the State Appellate Defender to represent appellant on appeal. On May 13, 1975, such counsel informed appellant by letter that she would file a motion for leave to withdraw.

This motion together with supporting brief in accordance with the precedent of Anders v. California, 386 U.S. 738 (1967), requests that such counsel be permitted to withdraw, because after consideration of the record and the applicable legal authorities there are no arguable errors to be presented to this court and a further appeal would be wholly frivolous.

From the record it appears:

1. The indictment properly charges the offense of possession of a controlled substance and the court had jurisdiction both of the subject matter and of the person of the defendant.

2. Four police officers saw defendant throw away an object which contained heroin.

3. Before closing arguments defense counsel made a motion in limine to preclude the State from commenting on the defense failure to call a certain witness.

The court denied the motion and ruled that the comment was permissible since the witness was a material witness and was clearly available to the defense. Under these circumstances the court's order denying the motion in limine may have been erroneous. However, such comment has been held to constitute reversible error only in cases where the evidence presented a close question for the jury or where other prejudicial error infected the defendant's trial. People v. Rubin, 366 Ill. 195, 7 N.E.2d 890 (1937); People v. Peoper, 2 Ill. App.3d 621, 276 N.E.2d 416 (3rd Dist., 1971). In the instant case, the positive and unimpeached testimony of four witnesses and other evidence against the defendant was overwhelming.

In addition, any error caused by the prosecutor's argument was waived by the defense counsel's failure to file a Post Trial Motion. People v. DeMarco, 44 Ill. App.2d 459, 195 N.E.2d 213 (1st Dist., 1963).

The sentence imposed was in accordance with statutory guidelines and could not be considered excessive in light of McClain's prior record. From a review of the record in the cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this court and that such

appeal would be frivolous and without possibility of success.

For the reasons stated, the action of the Circuit Court of Peoria County in this cause is affirmed, and the motion of the State Appellate Defender to withdraw as counsel for defendant Tony McClain is allowed.

Judgment Affirmed and Withdrawal Motion allowed.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day
of June A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12774

Agenda No. 75-159

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

WILLIE DAVIS,)

Defendant-Appellant.)

Appeal from
Circuit Court
Sangamon County
785-73

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Defendant was convicted in a jury trial of the offense of armed robbery. A sentence of not less than 6 nor more than 12 years in the Illinois State Penitentiary was imposed. Upon this appeal, the defendant's sole contention is that the sentence is excessive in light of his background and the circumstances of the offense. We affirm.

The offense here involved relates to the armed robbery of a night desk clerk at a hotel in Springfield, Illinois. The defendant in the commission of the offense was armed with a loaded gun. The offense is a Class 1 felony, and under the Unified Code of Corrections, the offense is not probational and is subject to a minimum sentence of not less than 4 years. (Ill.Rev.Stat.1973,

ch. 38, ¶ 1005-8-1(c)(2).) The defendant was 19 years of age at the time of the robbery. The record indicates that the defendant has been convicted of the unlawful possession of a controlled substance, that he had been placed on probation, and that he also had a juvenile record indicating a period of probation in connection with a charge of theft. The record indicates a history of drug addiction. The offense here involved precludes the defendant from eligibility to elect treatment under the Dangerous Drug Abuse Act. (Ill.Rev.Stat.1973, ch. 91 1/2, ¶ 120.8.) It is apparent from the reading of this record that the trial court considered the nature of the offense and the history and background of the offender prior to the imposition of sentence and that a sentence greater than the minimum was imposed for the stated reason that the defendant had twice been subject to probation and that in each instance rehabilitation by way of probation had been unsuccessful. While the sentence here imposed offends against the recommended ratio of a minimum of not less than one-third of the maximum, such ratio is not mandated for a Class 1 felony.

While this court, by reason of Supreme Court Rule 615 (Ill.Rev.Stat.1973, ch. 110A, ¶ 615), has authority to reduce the sentence imposed where the facts of the case and the history and character of the defendant warrant such actions, the authority granted is to be used with caution and circumspection. (People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673.) We are not persuaded that the sentence here imposed is one for the exercise of the authority conferred by rule.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.

NO. 74-267

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

29 MAY 1975
FILED
JUN 11 1975
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Monroe County.
Plaintiff-Appellee,)	
)	
v.)	
)	
BRUCE HARGRAVE,	)	Honorable Alvin H. Maeys,
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. JUSTICE KARNS delivered the opinion of the court:

The defendant, Bruce Hargrave, was charged by a criminal complaint with the offense of theft. He was convicted on his plea of guilty to this charge and was sentenced to a term of 3-1/3 to 10 years imprisonment.

The defendant appeals from the conviction and sentence contending that the judgment of conviction and sentence is void on jurisdictional grounds for failure of the complaint on which his conviction is based to charge an offense; specifically the defendant argues:

"The complaint for theft was defective in that [1] it failed to allege either ownership or the specific property involved, [2] that the control allegedly exerted was either knowing or unauthorized, or [3] that the defendant intended to permanently deprive the owner of the use or benefit of the property involved."

The People have confessed error to defendant's argument that the complaint is legally insufficient for failure to allege the requisite mental intent to deprive permanently the owner of the use or benefit of the property involved. We accept the People's confession of error and are also of the opinion that point 3 of defendant's argument above warrants a reversal of his conviction for theft and we need not, therefore, consider the other arguments presented on appeal.

The pertinent language of the complaint alleges that:

". . . on February 7, 1974, in Monroe County, Bruce K. Hargrave committed the offense of OBTAINING CONTROL OVER STOLEN PROPERTY OVER \$150.00 IN VALUE in that he obtained control over stolen property over \$150 in value knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe that property was stolen intending to deprive the owner of the use or benefit of the property; in violation of Section 16-1(d), Chapter 38 Illinois Revised Statutes."



The statutory definition of theft provides in pertinent part that:

A person commits theft when he knowingly:

.

(d) Obtains control over stolen property knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe that the property was stolen, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; (emphasis added) Ill.Rev.Stat., 1973, ch. 38, sec. 16-1(d)(1).

The language of the complaint charging the defendant with theft fails to allege that the control was obtained with the intent to deprive permanently the owner of the use or benefit of the property involved.

A complaint, information or indictment must set forth the nature and elements of the offense charged. Ill.Rev.Stat., 1973, ch. 38, sec. 111-3(a)(3). A requisite element of the offense of theft is the mental intent to deprive permanently an owner of the use or benefit of his property. (Ill.Rev.Stat., 1973, ch. 38, sec. 16-1(d)(1)), and a complaint which fails to allege the requisite mental state does not charge an offense and is therefore fatally defective. People v. White, 22 Ill.App.3d 206, 317 N.E.2d 273 (1974); People v. Matthews, 122 Ill.App.2d 264, 258 N.E.2d 378 (1970); People v. Slaughter, 67 Ill.App.2d 314, 214 N.E.2d 20 (1966) (Abstr.).

Since the complaint failed to charge the defendant with an essential element of the offense of theft, to wit, an intent on the part of the defendant to deprive permanently the owner of the use or benefit of the property in question, the complaint is fatally defective and the conviction of the offense of theft is reversed.

Reversed.

CONCUR: JONES, P.J., CARTER, J.

PUBLISH ABSTRACT ONLY



State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice

Honorable WILLIAM L. GUILD, Justice

Honorable ALBERT E. HALLETT, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 5, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

30
100

19-24

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District

At a session

held on the

day of

the year

19

On

the

day of

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

FILED

JUN 6 - 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the 18th
	)	Judicial Circuit,
v.)	
	)	DuPage County, Illinois.
RICARDO PAEZ,)	
)	
Defendant-Appellant.)	

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant herein was found guilty by a jury of attempt rape and burglary and was sentenced to 1-3 years in the State Penitentiary.

The defendant contends first that the State failed to prove that the defendant intended to have sexual intercourse by force and against the will of the prosecuting witness. Secondly, the defendant contends that the court erred in not granting a mistrial where the prosecuting attorney, in his opening statement, stated that the small son of the prosecuting witness was in bed with her and recovering from open heart surgery but the evidence failed to show that the child was in fact recovering from open heart surgery. Lastly, the defendant contends that the court erred in refusing to instruct the jury that "proof of an indecent assault, however aggravated, will not warrant conviction for assault with intent to commit rape unless intent to overcome all resistance is shown."

On August 17, 1973, at 3:00 a.m., the defendant threw a rock at the bedroom window of the complaining witness, broke the window and entered her bedroom. He removed his clothes and climbed into bed with her. She screamed and he put his hand over her mouth and got on top of her. The defendant testified variously that, "I wanted to have sex with Judith"; and when he broke the window and



entered the room his thought was, "like I said before, having sex with her." He then testified that when he laid beside her she asked him what he wanted and he said, "You know what I want." Explaining this he further stated,

"It means -- well I asked her, trying to ask her to have sex with me. Then she says 'No.' Then she just pushed me away. Well, I was near her, on top of her or somewhere around there."

The defendant was unsuccessful in having intercourse with the complaining witness. She "remained stiff as a board." He then proceeded to masturbate upon her. After this was accomplished he replaced his trousers, left his shirt on the floor and climbed out of the broken window by which he had entered. He was seen shortly thereafter by a policeman walking down the street, clad only in his trousers. The defendant admits the above but contends that he merely broke the window and entered the bedroom through the window at 3:00 a.m. for the purpose of talking the complaining witness into having intercourse with him. When she refused to do so, he proceeded to masturbate.

We first consider the contention that the defendant did not intend to have sexual intercourse with the complaining witness by force. Attempt rape under the present statute (Ill.Rev.Stat. 1973, Ch. 38, § 8-4 and 11-1) is the present offense of the former charge of "assault with intent to commit rape." In People v. Kruse (1943), 335 Ill. 42, 44, 52 N.E.2d 200, 201, the defendants admitted the assault and admitted that their purpose in stopping the victim was to seek sexual intercourse but denied the intent to rape the complaining witness. In answer to this contention the court stated:

"In a prosecution for assault with intent to commit rape the question whether the assault was made with the intent charged in the indictment is a question of fact to be determined from the evidence. [citations] The specific intent charged is the gist of the offense and the assault must be shown by evidence to be such as would amount to rape had the purpose of the assault been accomplished. It is not necessary, however, that an express intent be proved, for where, as here, the assault is admitted, intent may be inferred from acts as well as from words spoken by the plaintiffs in error during the assault. The fact that the accused may have abandoned his purpose does not relieve him from criminal liability. [citations]"



At this point it is to be noted that the refused instruction of the defendant is apparently based on the following statement from People v. Miller (1955), 7 Ill.2d 465, 469, 131 N.E.2d 25, 28, where the court stated:

"We agree that an indecent assault, however aggravated, will not warrant a conviction of assault with intent to commit rape, without proof of an intention to have intercourse with a woman by force and against her will. [citations] But this intention need not be an expressed one, it may be inferred from the acts of the accused and the circumstances of the assault. [citations] The mere fact that the accused is frustrated in his purpose [citation] or later desists from his purpose, does not relieve him of guilt. [citation]"

Or, as the court stated in People v. Marino (1944), 333 Ill. 203, 207, 57 N.E.2d 469, 471:

"Where, as here, the assault is clearly proved and not disputed, the intent may be inferred from acts as well as from words spoken during the assault. (People v. Kruse, 385 Ill. 42) In a prosecution for assault with intent to commit rape, the question of whether the assault was made with the intent charged in the indictment is a question of fact to be determined from the evidence. People v. Anderson, 382 Ill. 316; People v. Maher, 377 Ill. 488; People v. Makovicki, 316 Ill. 407."

In People v. Hamil (1974), 20 Ill.App.3d 901, 906-07, 314 N.E.2d 251, 255 the court stated:

"The intent to commit rape may, however, be inferred from the conduct of the accused, the character of the assault, the acts done and the time and place of the occurrence, as well as from the words spoken. [citations] The fact that the defendant broke off the attack after encountering resistance does not change the nature of the attack up to that point. People v. Poe, (1969), 109 Ill.App.2d 295, 248 N.E.2d 715."

* * *

"The only realistic conclusion to be drawn from the defendant's conduct toward Miss Lingle is that he initially intended to rape her. His conduct unquestionably constituted a substantial step toward achieving that objective. He is therefore guilty of attempt rape even though he eventually abandoned the project."

Whether the defendant entered the complaining witness' bedroom at 3:00 a.m. through a window which he had broken, took his clothes off and climbed into bed merely intending to talk her into having intercourse or whether the defendant intended to rape the complainant and was frustrated in his attempt to do so by the actions of the complaining witness was a question of fact for the jury, as indicated by the above

cases. The jury was thus presented with sufficient evidence from which it could conclude that the defendant intended to commit rape. In such a case we will not substitute our view of the evidence for that determined by the trier of fact. Defendant was proven guilty of attempt rape beyond a reasonable doubt.

The second contention of the defendant is that the opening statement pertaining to the open heart surgery of the child in bed with the complaining witness, which evidence was not offered, constituted reversible error. At the conclusion of the State's case the court specifically instructed the jury to disregard the opening statement of the State's Attorney wherein he stated, "the son lying in bed with her was recovering from open heart surgery," since there was no evidence of that fact. In view of this cautionary instruction, and in view of the overwhelming evidence of guilt of the defendant, we find no error in this regard.

The last contention of the defendant pertains to the instruction tendered by him as mentioned above for which we find no authority as the same is not found in I.P.I. and the instruction, as it stands, is patently in error.

For the reasons stated above, the judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR.



74-44

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable ALBERT E. HALLETT, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 9, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



JUN 9 - 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	THE FIFTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	OGLE COUNTY,
	)	ILLINOIS.
DONALD E. FANN,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

Following a jury trial, the defendant, Donald E. Fann, was convicted of operating a motor vehicle while under the influence of intoxicating liquor (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-501), illegal transportation of liquor (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-502), and improper lane usage (Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-709). The jury found him not guilty of exceeding the speed limit. On appeal, the defendant contends 1) that the State did not properly answer his discovery motion; 2) that the trial court improperly admitted into evidence an open, partially filled beer can found in the passenger area of the vehicle driven by the defendant; 3) that the trial court erroneously instructed the jury by failing to give three instructions tendered by the defendant; 4) that the breathalyzer was not proven to be an infallible instrument; 5) that the State's closing argument was improper; and 6) that the defendant was not proven guilty beyond a reasonable doubt.

Having considered these issues, we affirm the judgment of the circuit court.

At the trial, Officer Jess Suter of the Ogle County

Sheriff's Police testified that on May 23, 1973, at approximately 8:00 p.m., a motorist reported that in his opinion the driver of the truck preceding him was intoxicated. Officer Suter followed the described truck and observed that the vehicle crossed the white (right-hand) line, ran off of the road, crossed the center or yellow line two or three times, and was traveling at eighty miles an hour, according to the speedometer in Suter's squad car. He stated that these observations were made in following the truck for a distance of three-quarters to one and one-half miles. He then turned on the squad car's "Mars" light, and immediately a can containing a liquid was thrown from the truck. The driver of the truck did not stop his vehicle, but continued for another three-quarters of a mile, where he turned into the entrance driveway of an auto auction and stopped the vehicle. There were two passengers in the cab of the truck, which was driven by the defendant.

In response to Officer Suter's request for the defendant's driver's license, the defendant attempted to take the license out of his wallet. According to Officer Suter, the defendant fumbled and had difficulty in producing the license. When asked to accompany Officer Suter to the squad car, which was parked behind the truck, the defendant stumbled, held on to the truck, and was described as very unsteady on his feet. Officer Suter testified that the defendant's breath smelled of liquor. In the opinion of the witness, the defendant was intoxicated.

Officer Suter testified that he observed a liquid that looked and smelled like beer on the floor of the passenger compartment of the truck. Between one of the passenger's feet was an opened paper bag containing one unopened can of beer.

and one opened, partially emptied can of beer. The officer testified that the upper portion of the cans were in plain view. The opened can of beer was admitted into evidence over the objection of defense counsel, who argued that the opened can of beer was not admissible since it was in the possession of a passenger, and not in the possession of the defendant-driver.

After informing the defendant that he was under arrest for operating a motor vehicle while under the influence of intoxicating liquor, speeding, improper lane usage, and the illegal transportation of liquor, and of his in custodial rights, the defendant and the two passengers were taken to the Ogle County Sheriff's Office. The defendant was again informed of his in custodial rights and of his right to submit to a breathalyzer test. At this point, a video tape was taken of the defendant as he performed various balancing tests. The defendant consented in writing to submit to a breathalyzer test, and the test was administered.

On cross-examination, Suter testified that he did not operate the truck to determine its condition. In addition, the witness testified that the defendant had stated that he had sore feet. Officer Suter stated on cross-examination that he had no knowledge of the defendant's release from custody because he had placed the defendant in the custody of the jailer in accordance with police procedures.

On redirect examination, Officer Suter testified that the road was in good condition, that the pavement was dry and that there was no defect in the pavement which caused the defendant to drive the vehicle across the center line or off the road.

James McCaslin testified that he was driving behind the defendant and that the defendant's vehicle crossed the

center line more than ten times, causing approaching vehicles to leave the road. He flagged down the squad car and informed Officer Suter of his observations.

The testimony of Officer Suter was corroborated by Officer Fred Rollins, who was Suter's partner. He testified that the vehicle driven by the defendant crossed the center line and white lines and exceeded the speed limit during their pursuit.

Trooper Kenneth Clark, a licensed breathalyzer operator, had administered the test to the defendant. He explained the operational check list used in administering the breathalyzer test and stated that he had followed this procedure in administering the test to the defendant. He testified that the results of the test taken by the defendant were .12 and .10. A copy of the test record card and the log book were introduced as evidence.

In addition, Eric Jackson, who had been an inspector for the Illinois State Police breath analysis unit from February, 1973, to September, 1973, testified that he had been responsible for inspecting the instrument used in this case. He explained the process for checking the breathalyzer equipment and explained that the results of the inspections were entered in the log book assigned to the machine. He testified that the machine was functioning properly at the time the test was administered to the defendant.

James Cratty, the next witness presented on behalf of the State, testified that he was the custodian of video tapes and that the video tape taken of the defendant had been in his custody. At this time, the video recording was shown in court. After the film was shown, Cratty testified that the film had not been altered in any manner.

The defendant testified on his own behalf that on May 23, 1973, he drove a truck from Aurora to the auto auction where he intended to sell the vehicle. He stated that he had been hospitalized for an internal disorder, that he had been released from the hospital several weeks before the incident, and that at the time of the arrest, he had been taking four to six Darvon tablets a day. A year and a half or two years before the incident, surgery had been performed on his foot to remove a crushed bone. On direct examination, the defendant testified that he had consumed "a couple of beers" during the hours preceding his drive from Aurora to the auto auction. According to the defendant, he had difficulty steering the truck because the tie rods were loose. He asserted, on direct examination, that the alcoholic beverages he had consumed before undertaking his journey did not affect his driving ability. The defendant stated that the vehicle he was driving crossed the white line and the center line several times, but he asserted that this was due to the poor condition of the truck. In addition, the defendant testified that the speedometer on the truck was nonfunctional. However, he asserted that the truck was not capable of exceeding 55 or 60 miles per hour.

On cross-examination, the defendant admitted that he put a six-pack of beer in the cab of the truck before beginning the journey. He could not recall the hospital where he had been treated for the internal disorder. Nor could he recall the name of the physician who had treated him for this ailment and who had prescribed the Darvon.

Robert E. Smith, one of the defendant's passengers, testified that he was drinking beer in the vehicle during the journey, but he asserted that the defendant did not drink while driving the vehicle. However, the witness answered affirmatively

the defense counsel's question, "To you it's just one big blur, is that right?" Smith also testified that he had driven the truck previously, and that in his opinion it was in poor condition.

The defendant's other passenger, Franklin Slaten, testified that he had been drinking liquor heavily on that day. In his opinion, the defendant was less intoxicated than he was. He stated that he knew nothing about the mechanical condition of the truck, but he noticed that the steering mechanism was in poor condition. On cross-examination, he testified that during the ride he and the other passenger had consumed the six pack of beer.

The jury found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor, illegal transportation of liquor, and improper lane usage, and found the defendant not guilty of exceeding the speed limit. After a hearing in aggravation and mitigation, the defendant was fined an aggregate of \$325 plus costs.

On appeal, the defendant contends that the State did not adequately answer his discovery motion in that the State's answer to the motion denied knowledge of any admissions made by the defendant. The defendant asserts in his brief that the State introduced admissions of the defendant. However, the defendant fails to indicate in any manner the alleged admissions of the defendant which were allegedly introduced by the State at trial. We have thoroughly searched the record on review and have found the record devoid of any admissions of the defendant which were introduced by the State. This contention of the defendant is wholly unsubstantiated by the record. Moreover, we note that the only admissions of the defendant revealed in the record were made during defense counsel's direct examination of the defendant.

The second issue presented by the defendant is whether the open, partially-emptied can of beer, which was found in the cab of the truck driven by the defendant, was properly admitted as evidence. First, we note that there was no motion to suppress this physical evidence, which was found in plain view. Moreover, the State established a proper foundation for the admission of this evidence through Officer Suter's testimony showing a continuous chain of custody. (See People v. Brown (1972), 3 Ill. App. 3d 879, 881, 279 N. E. 2d 382 and People v. Banks (1974), 17 Ill. App. 3d 512, 514, 308 N. E. 2d 247.) Thus, the defendant's sole basis for this issue on appeal is that the can was not shown to have been in the possession of the defendant.

The defendant was charged with having violated Ill. Rev. Stat. 1971, ch. 95 1/2, par. 11-502 in that he transported alcoholic liquor with the seal broken within the passenger area of a motor vehicle. The defendant was not charged with violating this statute by possession of alcoholic liquor, as a passenger in the vehicle. (See People v. Millis (1969), 116 Ill. App. 2d 283, 252 N. E. 2d 395.) Possession of liquor with the seal broken is not a necessary element in establishing that the driver of a vehicle transported alcoholic liquor in violation of the statute. In the case at bar, it was not necessary to establish possession of the opened can of beer found in the passenger area of the truck driven by the defendant. Consequently, we conclude that the evidence was admissible.

Next, the defendant argues that the trial court erred in refusing to grant three of the defendant's tendered instructions. The first instruction which defendant asserts was erroneously refused by the court (Defendant's Instruction #2) states that the defendant is presumed innocent, that the State has the burden of proving the defendant guilty beyond a reasonable doubt,

and that the defendant is not required to prove his innocence. This instruction of the defendant is Illinois Pattern Instruction (Criminal) No. 2.03. This identical instruction, Illinois Pattern Instruction (Criminal) No. 2.03, had already been tendered by the State (People's Instruction #9) and had been given without objection.

The second instruction which the defendant complains was erroneously refused by the court (Defendant's Instruction #5) is identical to Defendant's Instruction #2. Hence, both of these tendered instructions duplicate People's Instruction #9.

The court is not required to be redundant in instructing the jury. "A court is under no obligation to give more than one instruction on the same subject matter and if an instruction is given which covers the subject as well as the one refused, it is not error to reject the latter." (People v. Robinson (1973), 14 Ill. App. 3d 135, 140, 302 N. E. 2d 228.) In the case at bar, the court was not required to give three separate, but identical instructions, all Illinois Pattern Instruction (Criminal) 2.03.

The third instruction which the defendant argues was erroneously rejected by the court (Defendant's Instruction #3) stated:

"The court instructs the jury that the defendant is a competent witness in his own behalf, and you have no right to discredit his testimony from caprice, nor merely because he is the defendant. You are to treat him the same as any other witness, and subject him to the same tests, and only the same tests, as are legally applied to other witnesses, and while you have the right to take into consideration the interest he may have in the result of the case, you also have the right, and it is your duty, to take into consideration the fact, if such is the fact, that he has been corroborated by other credible evidence."

Illinois Pattern Instruction (Criminal) 1.02, which instructs the jurors that they are the sole judges of the witnesses' credibility, that they may take into account a witness' ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice of the witness, the reasonableness of his testimony, and that they should judge the testimony of any other witness, had already been tendered by the State and given without objection by the court.

It is well established that an instruction which unnecessarily singles out the testimony of an individual witness and places undue prominence upon his credibility is objectionable and properly refused. People v. Robinson (1958), 14 Ill. 2d 325, 336, 337, 153 N. E. 2d 65; People v. Werhollick (1968), 101 Ill. App. 2d 353, 243 N. E. 2d 345, rev'd on other grounds (1970), 45 Ill. 2d 459, 259 N. E. 2d 265.

Moreover, the jury was instructed under Illinois Pattern Instruction (Criminal) 1.02, tendered by the State and given without objection, that the testimony of the defendant should be considered by them in the same manner as the testimony of any other witness. This instruction adequately covered the subject. Furthermore, under Illinois Supreme Court Rule 451 (Ill. Rev. Stat. 1973, ch. 110A, par. 451), when an Illinois Pattern Instruction adequately states the law, the I.P.I. instruction shall be used. See People v. Robinson (1973), 14 Ill. App. 3d 135, 140, 302 N. E. 2d 228.

The defendant contends that a proper foundation had not been established for the breathalyzer test results because the equipment was not proven to be in perfect condition. The record reveals that a licensed breathalyzer operator properly administered the test to the defendant. In addition, the inspector of that

specific instrument testified that the equipment was inspected regularly and was functioning properly. There was no evidence that the machine was defective. Moreover, the breathalyzer test results were admitted into evidence without objection by defense counsel. Consequently, we conclude that this argument by the defendant on appeal is not substantiated by the record.

Next, the defendant asserts that the State improperly commented upon the credibility of the police officers during final argument. However, defense counsel, Mr. Halfer, has failed to include in the record or in his brief the comments which allegedly were made by the State's Attorney. Consequently, this court cannot rule upon the merits of this contention. However, we note that as a general rule, it is proper to comment upon the credibility of one's own witnesses in final argumentation. (People v. Hurley (1973), 10 Ill. App. 3d 74, 293 N. E. 2d 341.) Indeed, the credibility of one's own witnesses is a proper subject for final argument. In addition, there is no indication, in the case at bar, that the State discredited the credibility of the defense witnesses. We conclude that there is nothing in the record indicating that the closing argument of the prosecutor was improper.

As a final issue, defense counsel argues that the finding of not guilty on the speeding charge indicates a reasonable doubt as to the three other charges for which the defendant was convicted. Defense counsel has failed to demonstrate the relationship between exceeding the speed limit and the charges of operating a motor vehicle while under the influence of intoxicating liquor, improper lane usage, and illegal transportation of liquor. Certainly, the jury could have found that the State had not proven beyond a reasonable doubt that the defendant had exceeded the speed

limit, and at the same time found that the State had established the three other violations beyond a reasonable doubt. There is no inconsistency in the verdicts. Moreover, the evidence upon which the defendant was convicted is overwhelming. We therefore affirm the judgment.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 12, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

1 1 1 1 1
JUN 12 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

No. 74 63

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

ERA HENSON,)	
)	
Plaintiff-Appellant,)	
)	
v.	)	Appeal from the Circuit
	)	Court of Kane County, Illinois.
FIRST NATIONAL BANK OF ELGIN,)	
as Administrator, and BARRY)	
DANIELSON, as Trustee of the)	
ESTATE OF CLAIRE WILLIAMS,)	
)	
Defendants-Appellees.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Plaintiff appeals from judgment on directed verdict for the defendants at the close of plaintiff's case. The sole issue presented is whether the trial court erred in so doing.

The amended complaint alleged in substance that on January 27, 1970, plaintiff, in the company of an escort, went to the roller skating rink operated by defendants' decedent, where they paid the required entrance fees and rented skates. After skating there for almost forty-five minutes the rear wheels came off her escort's skate (which, because of the negligence of defendants' decedent, were in faulty condition), without provocation on the escort's part or that of plaintiff, causing him to fall on top of her, and causing her to fall to the floor, resulting in plaintiff's severe and permanent injuries, medical and hospital bills, pain and suffering, and loss of wages. The complaint further alleged that plaintiff was in the exercise of ordinary care for her own safety and was not guilty of contributory negligence.

At the jury trial plaintiff presented three witnesses: Doctor Milton Wohl, who examined plaintiff in the emergency room at Sherman Hospital on January 28, 1970; Teresa Troccoli, a sixteen-year old friend of the plaintiff's daughter; and Sherry Henson, plaintiff's sixteen-year old daughter.

Dr. Wohl testified that when he examined her at the hospital emergency room on January 28, 1970, plaintiff complained of pain in both wrists which had "a good deal of swelling". He ordered X-rays taken. He diagnosed a fracture of the right radius, which he defined as the outer of two bones of the forearm, which was broken just above the wrist. Dr. Wohl applied a plaster splint on that arm from the palm to just below the elbow, and a pressure dressing to relieve the swelling. He also ordered medication for the pain and kept her in the hospital for five days because of the pain. She also "had some other work [done by her own physician] for which she was already on the waiting list" at the hospital because of other ailments. The last time he examined her was on April 7, 1970, when the fracture was healed and he then told her she could return to work on April 22nd. On cross-examination Dr. Wohl acknowledged that an X-ray report which he received on March 12, 1970, showed that the fracture was "considered healed in good position and alignment" and the "radiocarpal angle is normal".

Teresa testified that at the time of the occurrence she was in the ninth grade. She, Sherry, and plaintiff's two boys, Dave and Mike, accompanied plaintiff and her escort, Charles Simco, to the roller rink. Charles paid for the rental of her skates and her admission as well as Mrs. Henson's. (On cross-examination she stated she did not see Charles pay.) After the plaintiff and Charles were skating for thirty or forty-five minutes she heard a crash, looked and then saw Charles "on his back" on the floor and plaintiff "on

no testimony to support that statement. Moreover, there was no testimony either by Dr. Wohl or by Teresa or Sherry, causally connecting plaintiff's injuries to the fall at the rink. Indeed, none of the witnesses testified as to plaintiff's physical condition before that occurrence. In ruling on defendants' motion the trial court properly commented on the "entire absence of causal connection between the condition of ill being of the plaintiff and the incident out of which this cause of action arose". The jury would have had to speculate and conjecture on this element.

There is no question but that the plaintiff was suffering from an injury to her wrist but no testimony was offered in this case from which it could properly be inferred that it resulted from the fall at the rink. For aught we know from this record it could have resulted from some incident occurring prior or subsequent to the fall at the rink.

We refrain, therefore, from considering whether the record is sufficient to show negligence on the part of defendants' decedent or the lack of contributory negligence on the part of plaintiff. Likewise, we merely note in passing that no evidence was adduced in the case at bar as to plaintiff's medical and hospital bills or her lost wages and earnings.

In Manion v. Brant Oil Co., 85 Ill. App. 2d 129, 136, the court stated that "causal connection between the injury sustained must not be contingent, speculative or merely possible, but * * * there must be such degree of probability as to amount to a reasonable certainty that such causal connection exists." The case at bar does not meet the standard enunciated in the Manion case.

In Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510, the Supreme Court said: "[V]erdicts ought to be directed * * * only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

See also People v. Rosochacki, 41 Ill. 2d 483, 490 and Coleman v. Ill. Central R.R. Co., 59 Ill. 2d 13, 18.

In Jensen v. Elgin, Joliet and Eastern Ry. Co., 15 Ill.

App. 2d 559, 560m, the court said:

"On failure to prove a causal connection between the accident and the elements of damage sought to be charged to the accident, no recovery can be had."

For the foregoing reasons the judgment of the trial court is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

291A^{SD} 152

(24540-4M-9.70) 160-0

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day
of June A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12738

Agenda No. 75-158

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
RICHARD BOHM & MARVIN BOHM,	)	Macon County
)	
Defendants-Appellants.)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendants were charged with the offense of theft of property having a value in excess of \$150. After plea negotiations, an initial plea of not guilty was withdrawn and a plea of guilty was entered. Sentence of not less than 1 nor more than 10 years was imposed. The defendants appeal.

The State appellate defender has filed a motion for leave to withdraw as counsel for the defendants-appellants on appeal and in connection with that motion to withdraw have filed a brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in which it is concluded that there is no meritorious issue for review and that any request for review would be frivolous.



Pursuant to the mandate of Anders, the State appellate defender discussed the possible justiciable issues and in each instance has concluded that the same are without merit under established law and cases. Pursuant to the duty imposed upon us, we have examined the record on appeal and agree. The motion to withdraw was continued; the defendants were given leave to file additional points and authorities; none have been filed.

The record in this case indicates a valid indictment, the taking of a plea of guilty after thorough and complete compliance with the requirements of Supreme Court Rule 402 (Ill.Rev.Stat. 1973, ch. 110A, ¶ 402), and the imposition of sentence after review of a presentence report. The sentence imposed is not excessive. The judgment of the convictions and sentences accordingly are affirmed. The motion to withdraw is allowed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAY J. ALLOY, Presiding Judge

HONORABLE ALLAN L. STODER, Judge

HONORABLE RICHARD STENGEL Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day
of June A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12480

Agenda No. 75-164

THE PEOPLE OF THE STATE OF ILLINOIS,)
ex rel Richard K. Spear,)

Petitioner-Appellant)

vs.)

ALLYN SIELAFF, Director, Illinois)
Department of Corrections,)

Respondent-Appellee)

Appeal from
Circuit Court
Champaign County
72-X-1233

PER CURIAM

This appeal is from the dismissal of defendant's petition for writ of habeas corpus. Spear was originally indicted for the manufacture of more than five hundred grams of a substance containing cannabis. After a trial by jury the defendant was found guilty and sentenced two to six years. Notice of appeal was filed on February 22, 1973 and on September 6, 1973, Spear filed a petition for a writ of habeas corpus. The State moved to dismiss the petition on the grounds that the circuit court lacked jurisdiction because notice of appeal from the conviction had been filed contending that the decision of the circuit court at the time of sentencing was res judicata and barred further litigation of the same issue. The motion was allowed and the petition for writ of habeas corpus was dismissed.

On Feb. 11, 1975 the office of the State Defender moved



to withdraw as counsel for Richard Spear, petitioner-appellant, with timely notice being served on appellant, for the reason that there is no justiciable issue for review and that any request for further review would be frivolous.

In support of this motion the Appellate Defender states:

1. The only issue of substance presented by the petitioner-appellant in the above captioned cause also was presented by the petitioner in his direct appeal from his conviction and sentence.

(See the opinion of this court in People v. Richard K. Spear, 24 Ill. App. 3d 818, 321 N.E. 2d 705.)

2. Where a reviewing court has notice of facts which show that only moot questions or mere abstract proposition of law are involved, or where substantial questions involved in the court below no longer exist, it is proper to dismiss the appeal. People v. Redlich, 402 Ill. 270, 83 N.E. 2d 736 (1949); People v. Dawson, 5 Ill. App. 3d 975, 284 N.E. 2d 391 (1st Dist., 1972).

For the reasons stated and in accordance with the precedent of Anders v. California, 386 U.S. 738 (1967) the action of the Circuit Court of Champaign County in this cause is affirmed, and the Motion of the State Appellate Defender to withdraw as counsel for defendant Richard K. Spear is allowed.

Judgment affirmed and Withdrawal Motion allowed.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day
of June A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12780

Agenda No. 75-137

WILLIAM J. KLOCKENKEMPER,)
d/b/a BATCHTOWN MOTOR COMPANY,)
)
Plaintiff-Appellant)
)
v.)
)
CALHOUN COMMUNITY UNIT DISTRICT)
#40, and JAMES A. RINGHAUSEN,)
)
Defendants-Appellees)

Appeal from
Circuit Court
Calhoun County
No. 73-LM-4

Mr. JUSTICE GREEN delivered the opinion of the court:

Plaintiff, William J. Klockenkemper, d/b/a Batchtown Motor Company, brought action in the Circuit Court of Calhoun County against defendants Calhoun Community Unit District #40, and James A. Ringhausen seeking to recover the purchase price on an alleged conditional sales contract. The court hearing the case without a jury found that no meeting of the minds, sufficient to form a contract, occurred between the parties and entered judgment on its finding for the defendants. Upon appeal we affirm.

A document purporting to be a contract for the sale of an automobile by plaintiff to defendant Calhoun Community Unit District #40, a school district, for the sum of \$4638.02 was admitted into evidence. It was signed on behalf of the claimed purchaser by defendant Ringhausen, its superintendent. By the pleadings both parties allege, however, that this document did not contain the complete agreement of the parties. Under these circumstances, parol evidence may be considered to determine

the understanding of the parties (see Cleary, Handbook of Illinois Evidence, 2d Ed. 258 et. seq.).

All parties agree that the car was to be lent to the school district. Plaintiff's evidence tended to prove that an oral agreement was made between defendant Ringhausen and him that the car would be used exclusively for driver training; that if it was used otherwise defendant district would purchase it; and that the purported contract was executed to be effective only if the latter occurred. Defendant denied any such conversation or agreement and said that he got the car after requesting a loaned vehicle for general use for the district. He said that he signed the contract, because plaintiff requested it to use to obtain from Chrysler Corp. certain reimbursement available to dealers who furnished cars for schools.

After the car was in defendants' possession for about 6 weeks, and while being used by a district teacher to attend a professional meeting, it was badly damaged in a collision. The insurance company having the collision coverage on the car elected to repair it. After such repair was attempted the car was returned to plaintiff. His evidence indicated that it was greatly diminished in value. He then demanded payment on the contract and defendants refused.

Under the conflicting and confusing evidence, and under the issues formed by the pleadings, the ruling of the trial judge that no meeting of minds occurred is not contrary to the manifest weight of the evidence. Since we find no error of law to have occurred and deem that a more extended opinion would have no

precedential value we affirm without further discussion of the evidence, pursuant to Supreme Court Rule 23 (Ill.Rev.Stat. 1973, ch. 110A, par. 23). Accordingly the judgment is affirmed.

AFFIRMED.

SIMKINS, P.J., and CRAVEN, J., concur.

201A.391^{3D}

73-381

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 22, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

MAY 22 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

No. 73 391

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit Court
	)	for the 19th Judicial Circuit,
HENRY COLEMAN,	)	Lake County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant pleaded guilty to the charge of aggravated battery and was sentenced to a penitentiary term of not less than 18 months nor more than 5 years.

He appeals on the grounds that: (1) he was not adequately admonished under Supreme Court Rule 402(a)(1) as to the nature of the charge, there was no determination as required under Supreme Court Rule 402(c) that there was a factual basis for the plea, and (2) that the trial court abused its discretion in denying the defendant's motion to withdraw his previous plea of guilty and enter a plea of not guilty.

The defendant was an inmate of the County Jail when an incident occurred wherein another inmate was assaulted. The defendant, along with several other inmates, was indicted for deviate sexual assault and aggravated battery.

--9

The defendant first pleaded not guilty but later entered a plea of guilty to one count of the indictment--aggravated battery--with the understanding that all other charges would be dropped and

that he would receive a sentence of not less than 18 months nor more than 5 years in the penitentiary.

The record shows that at the hearing on the guilty plea the court took pains to satisfy himself that the defendant understood the negotiated plea he was entering and was in agreement with its terms; that he understood and knowingly waived his right to trial by jury and confrontation of his accusers; that he understood the maximum and minimum sentences for aggravated battery and that he had not been threatened or coerced to plead guilty. The court then allowed the Assistant State's Attorney to put certain questions to the defendant for the purpose of establishing the facts as to the assault, advising however that in the event the negotiated plea was not accepted the answers would not be used against him. The defendant's answers established that he had indeed assaulted the victim by striking him "six or seven times" although he denied the sexual assault. The victim had made a statement as to what happened in the jail. The judge, following the defendant's answers to the State's Attorney's questions regarding the incident, then asked the State's Attorney to hand him the victim's statement to read. After reading the statement to himself, without comment, the court resumed the hearing and announced that he would now entertain the negotiated plea. The defendant then moved, by his attorney, to withdraw his previous plea of not guilty and enter a plea of guilty to the charge of aggravated battery. The court inquired of the defendant if he understood that he was entering a plea of guilty to the charge of aggravated battery and the defendant replied, "Yes, I understand". The court again inquired if he agreed to that and the defendant answered, "Yes". The court then accepted the guilty plea and referred the matter to the Probation Department for pre-sentence investigation.

The guilty plea was entered on July 26, 1973. On September 10, 1973, the defendant appeared in court and moved to withdraw his plea of guilty and enter a plea of not guilty. The basis of the motion was that the defendant had not clearly understood the charge and the sentence when he pleaded guilty. In the interval between the guilty plea on July 26 and the motion to withdraw it, on September 10, a co-defendant, actually the step-brother of the defendant, had been tried and acquitted. The defendant, in answer to a comment of the court, denied that this was the reason for his change of plea and asserted that he had spoken to his counsel, the Public Defender, prior to the trial in question. This was verified by the Public Defender, although the record does not indicate exactly what the conversation between the Public Defender and the defendant was.

After referring to the transcript of the hearing and noting that he had asked the defendant twice if he understood ~~understood~~ that he was pleading guilty to aggravated battery and that the defendant replied that he did so understand, the court denied the defendant's motion to withdraw his plea of guilty. He then sentenced him to a term of not less than 18 months nor more than 5 years in the penitentiary in accordance with the previously negotiated plea.

We find no substance to the defendant's contention that the court did not adequately admonish him as to the nature of the charge. The charge was aggravated battery and in view of the defendant's admission that he had struck the victim "six or seven times" without the victim even touching him, it is not to be supposed that the defendant did not understand that he had thereby caused great bodily harm to the victim in so doing. The defendant is described in his probation report as being of "muscular build", weighing about 160 pounds and having engaged in weight lifting and having been a member of an amateur boxing team. This was a gang assault and it



is inconceivable that the defendant did not understand the nature, that is, the essence or character of the charge against him when, being a powerful man, he admitted striking the victim "six or seven times" while the victim was being assaulted or at least menaced by others. We think the defendant clearly understood the nature of the charge of aggravated battery when he pleaded guilty to it.

While the defendant cites several cases the general import of which indicate a strict and literal compliance with the language of Supreme Court Rule 402 is required as to determining the nature of the charge, we believe the recent Supreme Court case of People v. Krantz, 58 Ill. 2d 187, overruling the decision cited by the defendant being the Appellate Court decision in People v. Krantz, 12 Ill. App. 3d 38, disposes of this contention. The court in Krantz said:

"We note first the rule requires that there need be only substantial, not literal, compliance with its provisions. (People v. Mendoza, 48 Ill. 2d 371, 373-374.) Also, the entire record may be considered in determining whether or not there was an understanding by the accused of the nature of the charge." (58 Ill. 2d 192.)

The whole record here amply demonstrates that the court was justified in determining that the defendant understood the nature of the charge.

The second contention on this appeal is that there was no determination of a factual basis for the plea. The defendant's own statement indicates otherwise and in addition the court had before it the victim's statement as to what occurred in the jail cell. He did not comment in open court on what he had read but his action in reading it and immediately thereafter accepting the tendered plea of guilty clearly indicates that he considered it in determining that there was a factual basis for the plea.

We believe the recent case of People v. Doe, 6 Ill. App. 3d 799, is sufficient to dispose of the defendant's contention in this regard. The court in that case said:



"Defendant argues, however, that Rule 402(c) also requires that the factual basis be set out in detail on the record. We have carefully reviewed the language of both the rule and the related Committee Comments and find no such requirement either expressed or implied. Our conclusion is supported by the Committee Comments regarding Rule 402(c) which state:

'The language of paragraph (c) is based upon the recent revision of Rule 11 of the Federal Rules of Criminal Procedure, and, as is true under the Federal rule, no particular kind of inquiry is specified; the court may satisfy itself by inquiry of the defendant or the attorney for the government, by examination of the pre-sentence report, or by any other means which seem best for the kind of case involved. (Emphasis added.)'" (6 Ill. App. 3d 801.)

We find no merit to the defendant's contention with regard to the factual basis of the plea.

Lastly, the defendant maintains that the court abused its discretion in denying the defendant's motion to withdraw his guilty plea. The defendant points to the language of our Supreme Court in the case of People v. Riebe, 40 Ill. 2d 565, where, p. 568, the court quoted from People v. Schraeberg, 340 Ill. 620, as follows:

"'The discretion of the trial court to permit the withdrawal of the plea of guilty is a judicial discretion which should always be exercised in favor of innocence and liberty. The law favors a trial upon the merits by jury, and all courts should so administer the law and construe the rules of practice as to secure a hearing upon the merits, if possible. The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.'"

In our opinion, however, this general language has no application to the case before us. In the Riebe case there had been a history of mental instability and the defendant had been described by a psychiatrist as suffering from 'a psychoneurotic condition, depression type'. There had been negotiations and the



trial judge had intimated that the sentence would be "in the area" of the compromise sentence suggested by the defense attorney and the State's Attorney. Afterward, the judge imposed a considerably longer sentence and the defendant moved to withdraw his plea of guilty, which the court denied. In reversing the trial court's denial of the motion the Supreme Court stated that:

"When the trial judge thereafter changed his mind, and was no longer willing to impose minimum sentences of that duration, fairness required that he so inform the defendant and afford him an opportunity to withdraw his plea of guilty." (40 Ill. 2d 568.)

This court quoted from this language in reversing the trial court in People v. Baron, 130 Ill. App. 2d 588. However, in that case again there appeared to be a question of a misapprehension as to granting of probation.

This is a far cry from the situation in the case at hand. The defendant here does not rely on any change in the sentence as originally agreed to, to justify his change of plea. What he, in effect, contends, is not that he was deceived as to the sentence but that he did not intelligently and understandingly enter his guilty plea in the first place. But the record does not bear this out. Before denying the motion to change his plea the trial court referred to the record and noted that the defendant had been directly and specifically asked if he understood that he was pleading guilty to the charge of aggravated battery, to which the defendant replied, "Yes, I understand", and that the court again asked, "And do you agree to that?", and the defendant answered, "Yes", whereupon the court denied the motion. There is no breach of good faith or any allegation of a bargain made and not kept. It is a question of whether the defendant knowingly and intelligently pleaded guilty in the first place.

Nevertheless, if this was a case where a manifest injustice



would result if the defendant was not allowed to change his plea he should be allowed to do so as a matter of right, People v. Walston, 38 Ill. 2d 39. However, the court went on to say in that case in commenting on the Tentative Draft of the American Bar Association Standards Relating to Pleas of Guilty (1967),

"It is apparent from the language of 2.1(b) and the commentary thereon that these suggested standards do not propose that a defendant shall have a right to withdrawal of a prior plea of guilty in the absence of a showing that withdrawal is necessary to correct a manifest injustice, but, as does our present rule, leave the matter to the sound discretion of the trial judge."
(38 Ill. 2d 44.)

The present case is quite distinguishable from the recent case cited by the defendant in his motion to cite additional authority, People v. Chestnut, 15 Ill. App. 3d 188. There the court neglected or refused to hear defendant's counsel's motion to withdraw the guilty plea after probation was not granted. The case was remanded by the Appellate Court for the limited purpose of permitting the defendant to renew the motion to withdraw the guilty plea and present arguments thereon since this apparently had been previously denied. These facts have no bearing on the case before us.

This court in People v. Farnham, 8 Ill. App. 3d 722, upheld the trial court's denial of a motion to withdraw a guilty plea based on the allegation that the defendant was under the influence of drugs when the plea was entered. The court, however, did not believe the allegation and felt there was no manifest injustice involved, therefore the court affirmed the trial court's denial of the motion to withdraw the plea of guilty.

The rule appears to be that the motion to withdraw a plea of guilty should be granted as a matter of right if a denial will work a manifest injustice by preventing a trial on the merits, but

that unless a manifest injustice would result the denial of such motion is a matter within the discretion of the trial court.

Here no manifest injustice results from the denial of the motion. The defendant admitted the offense he is charged with and made his assent in open court to the bargain agreed to. He stated he knew what he was doing and the sentence imposed was exactly that agreed to by the defendant. While the defendant denied the attempted change in plea was the result of his step-brother's acquittal, it was not made until after that occurred and may not have been made otherwise. We see no reason to disturb the trial court's ruling on this question.

The judgment of the trial court is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

73-356

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 17, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JJH 17 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

CAMERON BRENNER,
Plaintiff-Appellant,
v.
CUVE M. GLOSSER,
Defendant,
WILBURT SALVESON,
Plaintiff-Appellee,
v.
CUVE M. GLOSSER,
Defendant.

Appeal from the
Circuit Court of
the Fifteenth
Judicial Circuit,
Ogle County,
Illinois.

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Each of the plaintiffs, in separate suits, brought small claim actions seeking \$1000 which was in the possession of the defendant. The cases were consolidated for trial and the court found that plaintiff-Salveson was entitled to the \$1000. Plaintiff-Brenner appeals. Glosser, having deposited the \$1000 with the circuit clerk, is not a party to the appeal.

There is no verbatim transcript, nor have the parties submitted a bystanders report or an agreed statement of facts in accordance with Supreme Court Rule 323(c) or (d). (Ill. Rev. Stat. 1973, ch. 110A, §323(c), (d).) The record's only statement of fact is the

trial court's memorandum of decision. Inasmuch as neither party has objected to this statement and neither has raised an issue of fact, we adopt the facts as they appear in the trial court's memorandum rather than dismiss the appeal. See Kahn v. Deerpark Inv. Co., 115 Ill. App. 2d 121, 128-29 (1969).

In January of 1973, Brenner advertised his business for sale. Salveson responded to the advertisement, inspected the business and, on February 17, 1973, both plaintiffs went to the law office of the defendant to ask that a contract be drawn for the sale of the business. After taking notes, defendant advised the plaintiffs that he would need a few days to draw up the contract. The plaintiffs were to return in one week to sign the document. As the meeting was concluding, Brenner asked if Salveson would show his "good faith" by making a \$1000 payment. Salveson agreed, but asked the defendant if there was a means by which his payment could be protected. Defendant suggested that Salveson draw the \$1000 check payable to the defendant "as escrowee only" which would permit the check to be deposited in defendant's trust account as "escrow" until the contract could be drafted and signed. Salveson followed the defendant's advice.

By the end of the week, the tentative agreement between the plaintiffs was terminated. Both thereafter demanded the \$1000 but defendant refused to pay either party and the small claim actions resulted.

In finding that Salveson was entitled to the \$1000, the trial court concluded that the contract for sale was unenforceable as violative of the statute of frauds, and that the escrow contract was unenforceable because Brenner failed to prove compliance with its terms.

Brenner conceded at trial that the contract for sale, being parol, fell within the statute of frauds provision in Section 2-201(1) of the Uniform Commercial Code (Ill. Rev. Stat. 1973, ch. 26, §2-201(1)) which states:

"(1) Except as otherwise provided in this Section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker***."

He contends, however, that he comes within the exception to the above provision as set forth in Ill. Rev. Stat. 1973, ch. 26, §2-201(3)(c), which states:

"(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable*** (c) with respect to goods for which payment has been made and accepted***."

In support of the contention it is argued that when defendant accepted the \$1000, he was acting as agent for both plaintiffs and, therefore, the amount could be classified as a part payment.

While an escrowee may be an agent of the obligee (Gronewold v. Gronewold, 304 Ill. 11, 16 (1922)) and, in a broader sense, may be the agent of both parties (Ortman v. Kane, 389 Ill. 613, 621 (1945); Hilyard v. Krisolofsky, 337 Ill. 584, 586 (1930); Lasen v. Knauer, 14 Ill. App. 2d 64, 67 (1957)), whether a party is an escrowee and/or agent remains a question of fact to be resolved in each particular case (Gronewold v. Gronewold, supra.) Here, the trier of fact found that the defendant was acting as escrowee only and not as agent for either of the plaintiffs. This decision will not be upset unless it is shown to be contrary to the manifest weight of the evidence.

The evidence is not in dispute. It reveals that the defendant accepted the \$1000 "as escrowee only." No evidence supports the contention that, by the acceptance, defendant was acting as agent for either party. Therefore, contrary to Brenner's contention, there was



no part-payment which could place the contract for sale under the exception to the statute of frauds. Consequently, in the absence of an enforceable contract, Salveson was entitled to a return of the \$1000. Main v. Pratt, 276 Ill. 218, 224-25 (1916).

Affirmance of the trial court's decision is additionally warranted by the fact that Brenner failed to meet his burden of proof in showing that the conditions of the escrow agreement had been met. (Kavanaugh v. Kavanaugh, 260 Ill. 179, 185 (1913); Helper v. Connolly, 403 Ill. 358, 363 (1949).) Under the agreement, the \$1000 was to be delivered to Brenner when the contract was signed, an act which, Brenner admits, never occurred. Under these circumstances, the escrow agent was obligated to return the \$1000 to Salveson.

For the reasons stated, the judgment of the trial court is affirmed.

Judgment affirmed

RECHENMACHER, P.J. and DIXON, J., concur

74-382

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 18, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the 18th
Plaintiff-Appellee,	)	Judicial Circuit,
)	
v.	)	DuPage County, Illinois.
)	
RONALD BAUER,)	
)	
Defendant-Appellant.)	

MR. JUSTICE GUILD delivered the opinion of this court:

Defendant was convicted of burglary in a jury trial and was sentenced to three years probation and further ordered to serve a total of 20 days periodic imprisonment in the DuPage County Jail on 10 successive weeks. Less than two months after sentencing a petition to revoke defendant's probation was filed alleging that defendant had failed to serve several periods of incarceration required as a condition of his probation. At the hearing on the petition to revoke probation, defendant's counsel admitted that defendant had not reported to jail; defendant's probation officer testified that defendant had also failed to report to him as required by the terms of defendant's probation; and, defendant himself admitted that he had not reported to his probation officer. At the conclusion of the hearing, the court revoked defendant's probation and sentenced him to a term of 1-3 years with the Department of Corrections with credit for the time he had served on probation. In this appeal from the revocation of probation, defendant's appointed appellate counsel has filed a motion pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, alleging that this appeal is frivolous and praying for leave to withdraw as defendant's counsel. Defendant has been given an opportunity to file any additional

matters meritorious to his defense.

We first note that in an appeal from a revocation of probation defendant is precluded from raising any errors which occurred at the trial which resulted in his being admitted to probation People v. Nordstrom (1966), 73 Ill.App.2d 168, 219 N.E.2d 151; People v. Fleming (1974), 23 Ill.App.3d 221, 318 N.E.2d 518.

Second, in light of the admissions made by defendant and his counsel and the testimony of defendant's probation officer, it cannot be said that the State failed to discharge its burden of proving by a preponderance of the evidence that the defendant violated a condition of his probation. Ill.Rev.Stat. 1973, Ch. 38, §1005-6-4(c)

Third, having examined the record in this case, we believe that defendant was afforded the minimal standards of due process applicable to a probation revocation proceeding. See Gagnon v. Scarpelli (1973), 411 U.S. 773, 36 L.Ed.2d 656, 93 S.Ct. 1756; and People v. Beard (1974), 59 Ill.2d 220, 319 N.E.2d 745.

Finally, defendant's sentence of 1-3 years imprisonment is not excessive in view of the one year minimum and 20 year maximum limits prescribed by the legislature for the Class 2 felony of burglary. Ill.Rev.Stat. 1973, Ch. 38, §19-1(b).

We have examined the record herein and the law applicable thereto and find no error which may be raised at this time. Accordingly, defendant's appointed appellate counsel's motion to withdraw is hereby granted and the judgment of the trial court is affirmed.

MOTION TO WITHDRAW ALLOWED; JUDGMENT AFFIRMED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 19, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

--9

JUN 19 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS.
SECOND DISTRICT
FIRST DIVISION

Abstract

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 17th Judi-
In the Interest of JASON BEAUDRY, a	)	cial Circuit, Winnebago
minor;	)	County, Illinois.
)	
KENNETH A. BEAUDRY,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Kenneth A. Beaudry, the father of the minor, appeals from an order adjudicating Jason Beaudry a neglected minor under section 702-4(1) of the Juvenile Court Act (Ill.Rev.Stat. 1973, ch. 37, par. 702-4(1)), and appointing the juvenile probation office of the court as guardian. The father contends that the adjudication of neglect was against the manifest weight of the evidence. He also challenges the dispositional order for failing to include findings of fact and further argues that it was improper for the court to split the custody and legal guardianship of the child between the maternal grandparents and the juvenile probation officer.¹

¹ The minor was placed with the maternal grandparents on October 31, 1973. We are advised that the permanent custody of the child has been returned to the father who has remarried.

The neglect order was entered on October 10, 1973 and in it the trial judge found that the two year old minor had "failed to receive proper and necessary support"; and that the "minor's environment is injurious to his welfare". We conclude that the findings are against the manifest weight of the evidence and reverse the judgment.

The custody of Jason had been awarded to his father in a divorce proceedings. The neglect petition arose from a single episode which occurred on July 27, 1973. Kenneth Beaudry had left his second floor apartment where he lived with the child at approximately 8:30 A.M. on that date, and the child was found alone and crying at 4:30 P.M. He was taken by a neighbor Karen Swick into her home and she called the juvenile authorities.

Karen Swick testified that when she saw the child he was well dressed in pajamas and was clean. She also said that on previous occasions when she had seen Jason "(h)e was a very well dressed little boy and very well clean". She also stated that Jason appeared very happy, played with the other boys and girls and was, to her knowledge, always cared for properly. She had never heard the child cry on any other occasion.

The juvenile officer who responded to Karen Swick's call testified that he observed that the child was dressed in pajamas but had a soiled diaper. He noted that the apartment was sparsely furnished with only a crib and blanket in the child's room; that there were few dishes in the apartment and no refrigerator. He found only a box of crackers, a bag of cookies and half a loaf of bread in the kitchen. Nevertheless, he testified that the home was clean, neat and without clutter. On examination of the child it was revealed that there were no marks or bruises on the child's body, no signs of lice or vermin, nothing to indicate any soreness in the throat, ears or eyes, and nothing apparently wrong over-all.

Kenneth Beaudry testified that after receiving custody of the child in the divorce proceedings he lived briefly with his folks and then in a religious commune before moving to Rockford approximately three weeks before the date of the incident. He worked as a night chef from 3 P.M. to 2 A.M. A neighbor in the downstairs apartment, Marsha Swanson, baby sat for Jason during Beaudry's working hours.

On July 26, 1973, when he returned from work Marsha Swanson was still awake painting her living room. Beaudry said he went in and helped her finish by 5 A.M. On the way out he picked up some medicine for Jason which he had been carrying, and Mrs. Swanson said "Why don't you leave it down here; I will have him tomorrow anyway". He understood this to be recognition of the fact that she would be babysitting for Jason on July 27th since about a week earlier he had mentioned to her that he would be going into Chicago on that date to see about a hardship discharge from the army reserves. Accordingly, when he left for Chicago at 8:30 A.M. on the morning of July 27th he opened the door to her apartment, noticed that her children were playing, called out to her once and left without waking her. Assuming that she was with Jason that day he went directly to work after returning later from his Chicago appointment.

There was further testimony that Marsha Swanson had been babysitting for Jason during the three week period that Kenneth Beaudry had lived in his apartment and there had never been any problem before nor any other occasion when the child was left alone without adult supervision or care. Mr. Beaudry would feed Jason, cook for him, and make sure that he napped. He would take him to the park on his days off and would occasionally join the Swansons for lunch. He had total access to the Swanson refrigerator and would generally

18
provide most of the contents. On the day of the incident it was "shopping day" and this accounted for the apparent absence of food.

There is also testimony that Jason was provided any medical attention he needed and Beaudry produced receipts for recent medical treatment of a small case of tonsillitis which the child had. Beaudry said he was buying furniture as he could afford it and that the child had a bed while he slept on the floor. Since arriving in Rockford he had purchased a refrigerator, some furniture and household items.

While Mrs. Swanson was unavailable for trial one of the officers testified as to his conversation with her. She acknowledged that there had been a discussion about caring for the child while Beaudry made a trip to Chicago. She apparently expected some further contact and receiving none she assumed that Kenneth Beaudry was home and went out for several hours to run errands without checking on the child. Accordingly, Jason was left alone and without adult supervision on the day in question.

It is well established that parents have an inherent right to the custody of their children and that the court should not violate that right upon slight pretext nor unless it is clearly in the interests of the child to do so. (Giacopelli v. The Crittenton Home (1959), 16 Ill.2d 556, 568; Lindsay v. Lindsay (1913), 257 Ill. 328, 340-341; Petition of Breger v. Seymour (1966), 74 Ill. App.2d 197, 200.) There are no specific guide lines for distinguishing between that which constitutes sufficient evidence of neglect and that which is merely "slight pretext". (See In re Gonzales (1974), 25 Ill.App.3d 136, 143; In re Interest of Stacey (1973), 16 Ill.App.3d 179, 182.) The term "neglect" varies in the context of surrounding circumstances. People ex rel. Wallace v. Labrenz (1952), 411 Ill. 618, 624.

The findings on which the trial judge based his conclusion of neglect were that the child had failed to receive proper support and that his environment was injurious to his welfare. These findings are contrary to the manifest weight of the evidence in this record. The record shows an isolated instance of careless and essentially irresponsible behavior based upon an apparent misunderstanding with the person who was to take care of the child during a period of time different from that which was customary. This unfortunate incident does not, however, represent child neglect sufficient, within the scope of the statute, to justify removal of custody, particularly when no other evidence or testimony points to a pattern of parental disregard. (See In re Gonzales, supra, 25 Ill.App.3d 136; In re Interest of Stacey, supra, 16 Ill.App.3d 179. Compare In the Interest of Garmon (1972), 4 Ill.App.3d 391.) The facts here in no way comport with those found sufficient to support a finding of neglect in Garmon.

In the view we have taken, we do not reach the other issues presented by the father of the child in this appeal. The order of the trial court declaring Jason Beaudry to be a neglected minor is therefore reversed and the attendant order of placement is vacated.

Reversed.

GUILD and HALLETT J.J., concur.

- - -

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice

Honorable WILLIAM L. GUILD, Justice

Honorable ALBERT E. HALLETT, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 26, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JUN 26 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the 15th
	)	Judicial Circuit,
v.)	
	)	Lee County, Illinois.
EARL E. JENKINS,)	
)	
Defendant-Appellant.)	

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant herein was charged with driving under the influence of intoxicating liquor, was tried by a jury, found guilty and fined the sum of \$200. He appeals.

At approximately 3:00 in the morning of September 25, 1973, a Lee County Deputy Sheriff was traveling north on U.S. Highway 51 and observed a white Corvette swerve into the incoming lane of traffic and force a southbound truck to move partially onto the shoulder to avoid hitting the Corvette. The officer turned on the siren, red lights and spotlight and stopped the car within a distance of three miles. The defendant, who was driving the Corvette, pulled off to the side of the road. Upon getting out of the car the officer noticed that the defendant swayed, he detected a strong odor of alcohol emanating from the defendant and he placed the defendant in the squad car. Enroute to a towing garage the defendant asked the officer if he could "cut him a break" since if he lost his license he would kill himself. In the squad car the defendant cried and was very talkative. His speech was slurred and, in the opinion of the arresting officer, he was intoxicated. A State policeman was in the Lee County Law Enforcement Center when the defendant was brought in. The State policeman testi-

fied that the defendant smelled of alcohol, was unsure about his balance and swayed when he walked and was talkative. When defendant asked the State policeman if he thought defendant were drunk the State policeman advised him that he assumed that he was under the influence of liquor.

The defendant testified that on the night in question he went to a bowling alley at 7:30 p.m. and admitted that he had had two beers there. From there he went to Frankie's Tavern in Rochelle where he had a vodka and orange juice at about 10:00p.m. From this tavern he went to another tavern in Rochelle where he had two more vodka and orange juices and left that tavern between 12:30 and 1:00 a.m. He further testified that after that he went to a restaurant and had breakfast. Shortly thereafter he was arrested as he was driving on the highway. He further testified that he had difficulty getting out of the Corvette because of its size. Contrary to the officer's testimony, he testified that as he was driving northbound he did not see any traffic traveling southbound. He denied that he crossed the center line, he admitted that at the time of his arrest he cried and that he told the officer that if he lost his license he would kill himself. He admitted further that he was driving at 75 mph at the time of his arrest. He further testified that after he told the officer he would kill himself the officer then placed handcuffs on him.

In this appeal the defendant contends first, that he was not proven guilty beyond a reasonable doubt and, second, that the arresting officer should not have been allowed to testify concerning an alcoholic influence report which had been marked for identification by the defendant as People's Exhibit No. 1 and subsequently introduced into evidence by the State. We shall consider the second contention first.

On cross examination of the arresting officer, defense counsel inquired as to whether the officer had prepared an "alcohol influence report." The officer reported that he had started to do so. The defense counsel then obtained the original of the same from the State, which was marked People's Exhibit No. 1 for identification.

This document was shown to the arresting officer and he was asked if that were the report he had filled out relating to the defendant. The officer identified the handwriting, his signature and that the report was in the same condition as it was when it was filled out. In this report the officer had set forth that the condition of the defendant's clothes was "orderly." Apparently defense counsel was using this as an attempt to impeach the testimony of the officer in that, upon cross examination by defense counsel, he had testified that the defendant's clothes were "just mussed up a little." Defense counsel further inquired, obviously from this exhibit, as to the defendant's attitude. The arresting officer answered that he was "talkative," which was found in the exhibit as well as in the officer's testimony on direct examination. Lastly, defense counsel inquired as follows:

"This form of report is only used for cases where the person has been arrested for driving under the influence, isn't that correct?"

On re-direct examination by the State inquiries were made relative to the other observations contained in the alcoholic influence report. No objection by defense counsel was made to the answers to these inquiries and it is to be observed that the answers to the inquiries from the alcoholic influence report were in substantial accord with the direct testimony of the arresting officer. At the conclusion of the inquiries by the State relative to this report the same was offered into evidence and, over the objection of the defendant, was admitted. We do not find, under the factual situation before us, that the admission of the alcoholic influence report into evidence constituted reversible error. If anything, the error was initiated by defense counsel in referring to this document by name and later stating that this type of report was only used where the party was arrested for driving under the influence. Additionally, upon re-direct examination by the State, at no time did defense counsel object to the inquiries of the officer relative to the contents of the report,

which substantiated in detail the direct testimony of the officer.

We have observed in City of Crystal Lake v. Nelson (1972), 5 Ill.App.3d 353, 362, 233 N.E.2d 239, 242, that:

"...the courts of this State have consistently held that laymen, or in this case the arresting officer and the officer in the station, based upon their experience, may testify as to whether or not in their opinion the defendant was or was not under the influence of alcohol or intoxicated."

While the direct testimony of the arresting officer may have been corroborated by the inclusion of this report, as indicated, we do not find this to be reversible error. It has been pointed out many times that defense counsel may not sit idly by, let the evidence be introduced, and then subsequently contend that the introduction of such evidence constitutes reversible error.

We turn then to the first contention of the defendant that he was not found guilty beyond a reasonable doubt. With this contention we do not agree. The defendant himself testified that he had had two 7 oz. beers while he was bowling and three vodka and orange juice drinks later in the evening. While it may be true that subsequent to his drinking he did have food, the fact remains that both the arresting officer and the State policeman testified as to the indicia of defendant's intoxication as indicated above and their opinion that he was under the influence of intoxicating liquor. Defendant's testimony as to the amount of alcohol imbibed by him may well have been considered by the jury as evidence of his intoxication. This court has repeatedly said that we will not substitute our opinion for that of the jury in a determination of fact. As we stated in City of Crystal Lake v. Nelson, supra,:

"It was within the jury's province to determine whether they believed the officer's testimony as to intoxication.... Where guilt or innocence of a defendant depends upon conflicting testimony, the court will not substitute its judgment for that of the jury. [Citations]." 5 Ill.App.3d at 363, 233 N.E.2d at 242.

We therefore affirm the conviction of the defendant.

AFFIRM.

SEIDENFELD, P.J., and HALLETT, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 30, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit Court
) of Winnebago County, Illinois.
DONEY LEE BROWN, JR.,)
)
Defendant-Appellant.)

PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Winnebago County, revoking defendant's probation on a conviction for theft and sentencing him to a term of not less than one nor more than five years in the penitentiary.

The defendant was charged with burglary. He waived indictment and pleaded guilty to the information so charging him on February 8, 1971. On March 10, 1971, an order was entered placing the defendant on probation for three years. On May 6, 1971, a petition to vacate his probation was filed, alleging that he had committed a burglary on March 30, 1971, while on probation. The defendant pleaded guilty to the second burglary in a probation revocation hearing on July 1, 1971, whereupon his probation was revoked and he was sentenced to serve a term of not less than one nor more than five years in the penitentiary.

The defendant appeals from the order revoking his probation on the ground that the court erred in not admonishing the defendant as to the consequences of his admission of the allegation contained in the petition to vacate his probation.

At the revocation hearing the following colloquy took place:



"THE COURT: What do you say, Mr. Vella"

MR. VELLA: [Court appointed Public Defender]
Your Honor, I have spoken with Mr. Brown and gone over the petition. At this time he is prepared to either admit or deny the allegations in the petition.

We are admitting the allegations of the petition.

THE COURT: Well, let him admit it. Do you admit the allegations in the petition?

THE DEFENDANT: Yes, sir.

THE COURT: I will revoke probation on the admission. Before I do, give me the evidence that you have.

MR. LA FAYETTE: [State's Attorney] Your Honor, the store we are speaking of is Fear's General Store, owned by Mr. Fear. The store had been broken into, a padlock had been jimmied off, and the iron bar across the door had been pried from the door casing. There was \$45 in change, forty cartons of cigarettes, twenty pocket knives, sixteen watches, three socket sets, five power drills, circular power saw, Black and Decker, those things were taken.

We have a signed statement by the defendant admitting that.

* * * * *

THE COURT: Is that true, what the State's Attorney states?

THE DEFENDANT: Yes, it is true, your Honor.

THE COURT: You are admitting this. Are you admitting it because you are guilty?

THE DEFENDANT: Yes.

THE COURT: All right, I will revoke and terminate the probation and set it down for aggravation and mitigation."

The defendant contends that at the revocation hearing he was entitled to the admonishments required under Supreme Court Rule 402 (Ill. Stat. 1971, ch. 110A, par. 402) as to guilty pleas. In support of his contention he invokes the language of People v. Pier, 51 Ill. 2d 96,



to due process in revoking probation, wherein the court, after stating at due process of law requires "that a defendant charged with having violated his probation be entitled to a conscientious judicial determination of the charge according to accepted and well recognized procedural methods", went on to say:

"Justice demands that he also be entitled to the protection of the same due-process requirements which pertain to pleas of guilty when he waives his right to a judicial determination of the charge that he violated his probation and confesses or admits the charges of the revocation petition. If he does so in reliance upon an unfulfilled promise by the State's Attorney, then his confession or admission of the charge is not voluntary for the same reason that a plea of guilty entered in reliance upon an unfulfilled promise of the State's Attorney is not voluntary." (51 Ill. 2d 100.)

While the above quoted language may perhaps be susceptible to the interpretation put upon it by the defendant, such interpretation is not correct. The Supreme Court repudiated that interpretation in People v. Beard, 59 Ill. 2d 220, where, in commenting on the Appellate Court opinions in People v. Watkins, 10 Ill. App. 3d 875, and People v. Ryan, 5 Ill. App. 3d 1006, the court said:

"We cannot subscribe to the broad constitutional basis which defendants seek to engraft upon our decision in People v. Pier. The aforesaid language of that opinion must be interpreted within the factual circumstances presented in that case. (People v. Arndt, 49 Ill. 2d 530, 533.) In People v. Pier we did not consider the applicability of Rule 402 upon probation revocation proceedings. We merely expressed the view that due process required that a defendant's admission must be voluntarily made." (59 Ill. 2d 225.)

The court then went on to say:

"Rule 402 was formulated to secure proper entry of guilty pleas. (People v. Krantz, 58 Ill. 2d 187, 194-195.) A defendant in a criminal trial or a probation hearing may ultimately be incarcerated as a result thereof, but there is a qualitative difference between a criminal conviction and the revocation of probation as recognized in Gagnon v. Scarpelli. [36 L. Ed. 2d 656.] also People v. Grayson, 58 Ill. 2d 260, 264-265.) We therefore hold that Rule 402 is not applicable to probation revocation proceedings. (Emphasis added.) (59 Ill. 2d 226-227.)



The language quoted above vindicates the position taken this court in People v. Evans, 3 Ill. App. 3d 435, where we declined apply the admonishments of Supreme Court Rule 402 to a revocation hearing. While we recognized that a revocation hearing must be conducted in accordance with accepted standards of due process, we said, "there is no analogy as counsel contends, between acceptance of a plea of guilty and the imposition of a sentence upon the revocation of probation." (3 Ill. App. 3d 437.)

The record before us amply demonstrates that proper regard had for due process in defendant's revocation hearing and his admission of the truth of the allegations of the revocation petition was voluntarily made. The defendant has had what he is entitled to--due process. His reliance on Pier as to the necessity for admonishment under Supreme Court Rule 402 is misplaced, as indicated by the language from Beard quoted above. We therefore find no error in the revocation proceedings.

The judgment of the trial court is affirmed.
Judgment affirmed.

MAS J. MORAN and DIXON, JJ., concur.



1975
Halt
1975
1975

)

)

)

)

)

)

)

)

)

)

)



2; People ex rel. Sheffield v. Towney, 14 Ill.App.3d 264, 302 N.E.2d 150 (1973); People ex rel. Lewis v. Frye, 42 Ill.2d 58, 245 N.E.2d 433 (1969); People ex rel. Kelly v. [redacted], 42 Ill.2d 287, 242 N.E.2d 261 (1968). The petitioner does not contend that his conviction is void or that he is entitled to release as a result of his conviction.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Motion to withdraw allowed.

publish Abstract Only.

nes, P.J., and Eberspacher, J., not participating.



IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
)
) Appeal from the Circuit Court of the Second
Plaintiff-Appellee,) Judicial Circuit, Jefferson County.
vs.)
)
GENE WILLIAMS,) Honorable Charles E. Jones and
) Honorable Harry L. Ziegler,
) Judges Presiding.
Defendant-Appellant.)

FILED
JUN 17 1975
CLERK OF THE COURT
FIFTH DISTRICT OF ILLINOIS

Mr. JUSTICE G. MORAN delivered the opinion of the court:

The defendant Gene Williams appeals from convictions of the offenses of escape and unlawful restraint entered pursuant to negotiated pleas of guilty in the circuit court of Jefferson County. The defendant's sole allegation of error is that he was improperly convicted and sentenced for two separate offenses which were part of a single criminal transaction.

The grand jury of Jefferson County returned two indictments against the defendant totaling five counts. The defendant was charged with two counts of burglary, one count of escape, and two counts of unlawful restraint. On June 11, 1974 the defendant pled guilty to escape and one count of unlawful restraint in return for which the state agreed to dismiss the other charges and recommended that he be given concurrent sentences of one to three years. The court accepted the plea agreement and his plea was taken in compliance with Supreme Court Rule 402 (Ill. Rev. Stat. ch. 110A, par. 402). He received the recommended sentence.

In Illinois it is well-established that where two violations arise out of the same transaction, they must be viewed as but one offense and a defendant may be convicted and sentenced for only the single most serious crime. People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1. From our review of the record, it is apparent that the actions constituting unlawful restraint merely enabled and were part of the greater offense of escape. Therefore, the defendant's conviction of unlawful restraint must be reversed and the sentence received must be vacated. People v. Lerch, 52 Ill.2d 78, 289 N.E.2d 293; People v. Whittington, 46 Ill.2d 405, 265 N.E.2d 679; People v. Powell, 21 Ill.App.3d 423, 315 N.E.2d 627.



The state objects that the result reached above is inequitable in that it affirms the plea "bargain" while at the same time reducing the consideration offered by the defendant. It is argued that reversal of the conviction and vacation of the sentence for unlawful restraint allows the defendant to avoid the consequences of that charge and the burglary counts, the state having agreed to dismiss the burglary charge as part of the plea agreement. The state argues that this amounts to adding the judicial imprimatur to a process which undermines the role of the negotiated plea in the criminal justice system. We disagree. The state should have no grounds for complaint, having agreed to the terms of the plea agreement. If the charges agreed on were improperly considered separate transactions, the fact that one conviction must be reversed and the sentence vacated does not affect the conclusion that the defendant was fully punished for his criminal conduct.

For the reasons given, the conviction and sentence for escape is affirmed. The conviction of unlawful restraint is reversed and the sentence therefor is vacated.

Affirmed in part and
reversed in part.

CONCUR:

Karns, Carter, JJ.

PUBLISH ABSTRACT ONLY.



NO. 73-100

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Saline County
Plaintiff-Appellee,)	
)	
v.)	
)	
JAMES WILLIAMS and HERMAN YATES III,)	
	)	Honorable John H. Clayton,
Defendants-Appellants.	)	Judge Presiding.

PER CURIAM

Defendants Rico Latimore, Arthur Vesey, James Williams and Herman Yates III were indicted for the offense of rape. A jury found the defendants guilty and on October 17, 1972 Latimore was sentenced to a term of 9 to 20 years and Vesey, Williams and Yates were each sentenced to a term of 7 to 20 years. All four defendants appealed separately. We subsequently ordered the four cases consolidated for purposes of oral argument and opinion. Because of our opinion concerning Williams and Yates, however, we have found it necessary to sever their appeals from those of Latimore and Vesey.

On appeal Williams and Yates contend that they were erroneously prosecuted as adults contrary to the requirements of the Juvenile Court Act, Ill.Rev.Stat. 1971, ch. 37, sec. 701-1, et. seq. The People have filed their brief in this cause and confess error. We have examined the record and are also of the opinion that criminal proceedings were improperly instituted against these defendants.

Both Williams and Yates were 16 years of age at the time of the alleged offense. The State's Attorney obtained indictments against Williams and Yates and prosecuted them under the criminal laws of this State without filing a petition pursuant to the provision of the Juvenile Court Act, Ill.Rev.Stat. 1971, ch. 37, sec. 702-7. The State's Attorney's determination of which court a minor is to be prosecuted is expressly conditioned upon filing of a petition which allege the commission of a crime. People v. Rahn, 59 Ill.2d 302, 319 N.E.2d 787 (1974). We have recently discussed this question in greater detail in People v. Caudell, Docket No. 73-74, filed June 9, 1975, and do not feel that a repetition of that discussion is necessary.



Because of the failure to comply with the requirements of the Juvenile Court Act, the judgment of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

PUBLISH ABSTRACT ONLY.

EBERSPACHER and G. MORAN, J.J., not participating.



IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JUN 11 1975
WILLIAM T. GILMAN
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Wayne County.
)	
vs.)	
)	
CLIFFORD RUSSELL WHITE,	)	Honorable Alvin Lacy Williams,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant, Clifford White, entered a plea of guilty to a criminal complaint charging him with the offense of intimidation. He was sentenced to a term of probation for two years. Subsequently a hearing on a petition to revoke probation was held. As a result of this hearing defendant's probation was revoked and he was sentenced to a term of one to three years imprisonment.

On appeal, the defendant contends that the complaint is fatally defective on jurisdictional grounds for failure to charge the defendant with all the elements of the crime of intimidation, specifically for failure to charge that the defendant threatened to endanger the bodily safety of another person with the intent to cause that person to perform or to omit the performance of any act. The People have filed a Motion to Vacate Conviction and therein agree with the defendant's contention. We are of the opinion that defendant's argument warrants a reversal of his conviction for intimidation and we need not, therefore, consider the other arguments presented on appeal.

The pertinent language of the complaint alleges that:

" . . . the said Clifford Russell White did knowingly threaten to perform, without lawful authority, an act which would endanger the bodily safety of Pearl Weller and Dorthiea Bradham in that he discharged a .22 caliber rifle in the direction of Pearl Weller and he did wield or point the said rifle in the direction of Dorthiea Bradham in a reckless manner. He did discharge this gun in the presence of Pearl Weller and Dorthiea Bradham, at their family's home located in Elm River Township, Wayne County, said acts endangering the safety of Pearl Weller and Dorthiea Bradham in violation of Chapter 38, Section 12-6(a)(1) of the Illinois Revised Statutes of 1971



the statutory definition of intimidation reads, in part:

- (a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
- (1) Inflict physical harm on the person threatened or any other person or on property; or

(emphasis added) Ill.Rev.Stat., 1973, ch. 38, sec. 12-6(a)(1).

A complaint must set forth the nature and elements of the offense charged. Ill.Rev. Stat., 1973, sec. 111-3(a)(3). A requisite element of the offense of intimidation is the mental intent to cause another to perform or to omit the performance of any act (Ill.Rev.Stat. 1973, ch. 38, sec. 12-6(a)(1)). A complaint which fails to allege the requisite mental state does not charge an offense and is therefore defective. *People v. White*, 22 Ill.App.3d 206, 17 N.E.2d 273 (1974); *People v. Matthews*, 122 Ill.App.2d 264, 258 N.E.2d 378 (1970); *People v. Slaughter*, 67 Ill.App.2d 314, 214 N.E.2d 20 (1960) (Abst.).

Since the complaint failed to charge the defendant with an essential element of the offense of intimidation, to wit, that the defendant intended to cause another to perform or to omit the performance of any act, the complaint is fatally defective and the conviction of the offense of intimidation is reversed. (*People v. Kite*, 10 Ill.App.3d 620, 295 N.E.2d 100 (1971)).

Reversed.

Cones, P.J. and Eberspacher, J. not participating.

Publish Abstract Only.





60643

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
SAMUEL SMITH, JR.,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM
Before Stamos, Leighton, and Hayes, JJ.

Samuel Smith, Jr., petitioner, was found guilty after a bench trial of one charge of murder and two charges of armed robbery (Ill. Rev. Stat. 1969, ch. 38, pars. 9-1 and 18-2). He was sentenced to concurrent terms of 20 to 40 years on the charge of murder and 2 to 5 years on each charge of armed robbery. Petitioner appealed and on June 27, 1973, this court affirmed the judgments of conviction. People v. Smith, 12 Ill. App. 3d 507, 299 N.E. 2d 492.

On July 11, 1973, petitioner filed a pro se petition pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.). An attorney was appointed to represent petitioner and an amended post-conviction petition was filed. On May 14, 1974, upon motion of the State, petitioner's amended post-conviction petition was dismissed without an evidentiary hearing. Petitioner appeals that dismissal.

Petitioner's first contention is that he was entitled to an evidentiary hearing on the allegation in his amended post-conviction petition that the trial judge should have disqualified himself since he had heard testimony at a prior bench trial of three co-defendants which implicated the petitioner. Petitioner concedes that the trial judge did not in any manner



prior to or at trial indicate that he was prejudiced against petitioner. The gist of petitioner's argument is that the trial judge who heard testimony implicating petitioner at the prior trial of three co-defendants could not possibly be fair and impartial and was inherently prejudiced.

Courts of this State have often stated the rule that a trial judge, in a bench trial, is presumed to consider only competent evidence. People v. Bey, 51 Ill. 2d 262, 281 N.E. 2d 638; People v. Fuca, 43 Ill. 2d 182, 257 N.E. 2d 239. The basis of this rule is the recognition that a trial judge possesses the ability to determine the factual issues based only upon legally relevant and competent evidence introduced at trial and will not let any personal bias, prejudice or irrelevant material enter into his determination.

In United States ex rel. Bennett v. Myers, 381 F. 2d 814 (3rd Circuit) the defendant sought a writ of habeas corpus to overturn his State conviction on the charge of robbery. One of defendant's contentions was that the trial judge should have been disqualified because he had heard testimony regarding a co-defendant's confession which implicated the defendant. The court rejected defendant's contention holding:

"There would be a complete breakdown on the operation of the machinery of justice if we refuse to recognize the capacity of a trial judge to put aside what he has heard if it is not legally relevant to the case."

See also United States v. Dichiarinte, 415 F. 2d 126 (7th Circuit).

In the case at bar, petitioner has not alleged, and indeed the record does not demonstrate, that the trial judge in any way indicated that he was in any manner prejudiced against the petitioner. On appeal petitioner concedes that the



record demonstrates, to use petitioner's term, a "clean" trial. We cannot accept petitioner's argument that the trial judge was inherently prejudiced by having heard testimony implicating petitioner at a previous trial of several co-defendants. There is nothing in the record which would in any way demonstrate that the trial judge in finding petitioner guilty considered any evidence not legally relevant to the case. Under these circumstances we conclude that the trial judge was not under a duty to excuse himself.

Petitioner's next contention is that the trial judge should have called the grounds for his disqualification to the attention of the parties. Petitioner argues that trial counsel was unaware that the evidence adduced at the prior trial implicated the petitioner. Petitioner's argument is based wholly upon speculation. The record demonstrates that prior to trial, defense counsel filed a motion for acquittal on the theory of collateral estoppel in that a co-defendant had been convicted of the shooting with which petitioner was charged.^{1/} This motion was denied by the trial court. However, this motion failed to demonstrate exactly what knowledge of the prior trial defense counsel had in his possession. Attached to the amended post-conviction petition was petitioner's affidavit in which he stated that as far as he knew his trial counsel was not aware of the testimony adduced at the prior trial. Again, this is at best speculation. Petitioner could have attached a copy of an affidavit of defense counsel to the post-conviction petition, but did not do so. From the pre-trial motion filed by defense counsel it is evident that counsel knew the same trial judge had presided at the previous trial of several co-defendants. Nevertheless, counsel

^{1/} The co-defendant had been convicted on the basis of legal accountability. Petitioner herein had been charged as the principal.



in determining his trial tactics chose not to make a motion for substitution of judges.

We have previously noted there is no evidence that the trial judge was prejudiced against the petitioner. Since the trial judge was not disqualified, there was nothing which he was obligated to call to the attention of defense counsel. A trial judge is under no duty to instruct an attorney on how to prepare his case for trial or the tactics he should take prior to or at trial. We find no error in the trial judge's actions.

Petitioner's final contention is that he did not knowingly and intelligently waive his right to a trial by jury in that he was unaware of the fact that the trial judge had prejudged his case. This argument is predicated upon defendant's conclusion that the trial judge had prejudged his case when he found a co-defendant guilty at a prior bench trial and the testimony at that trial implicated the petitioner. As we have noted earlier in this opinion, the petitioner has failed to demonstrate, and the record does not show, any evidence which demonstrates that the trial judge was prejudiced against petitioner. In the original pro se post-conviction petition filed in this case petitioner admitted that the trial judge informed him that he had a right to a trial by jury and that petitioner waived his right based upon the advice of counsel. Upon this record we conclude that petitioner has failed to demonstrate that his waiver of his right to a trial by jury was not knowingly and understandingly entered.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



2014-30 30

SEP 17 1975

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
JOSEPH A. POWER,
JUDGE PRESIDING.

HONORABLE
JOSEPH A. POWER,
JUDGE PRESIDING.

PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

On appeal, relator raises three issues: (1) whether relator's sentence should be concurrent with the Alabama sentence where the Illinois judgment did not specify consecutive sentences and where it was impossible for relator to begin serving his sentence on the date specified in the Illinois judgment; (2) whether relator was denied the equal protection of the law when his sentence was construed under the Illinois statute then in effect to run consecutively to the Alabama sentence; (3) whether



relator's guilty plea was involuntary where it was based upon the mistaken understanding that his Illinois and Alabama sentences would be served concurrently.

The petition for writ of habeas corpus was filed by relator on April 6, 1973, alleging his incarceration in Illinois pursuant to a judgment entered on October 17, 1963. The petition alleged that the mittimus issued upon that conviction on October 18, 1963, and the sentence of ten to fifteen years imposed thereby, less good time, was satisfied in December, 1971; that respondent has refused to permit the time served on the Alabama sentence to be credited against the instant sentence, respondent claiming that the Illinois sentence did not commence until expiration of the Alabama sentence and until relator was received at the Illinois State penitentiary; that the original mittimus does not provide that the Illinois sentence "be held in abeyance" until the completion of the Alabama sentence, but directs delivery of relator to the Illinois State Penitentiary for service of the Illinois sentence; that the original mittimus had been in force and effect and was satisfied in December, 1971; and that relator is therefore being deprived of his freedom by respondent, who has exceeded "the jurisdiction" of that mittimus. The petition for writ of habeas corpus further alleged that relator's trial counsel informed relator that the trial judge stated, shortly after the instant sentence was imposed, that the sentence was to commence running from the date of the issuance of the mittimus and that the sentence had in fact been running.

Respondent's motion to dismiss relator's petition, filed on August 2, 1973, alleged that the trial court which had



entered the instant judgment had jurisdiction over the relator and over the subject matter; that relator failed to bring himself within the provisions of the law relating to habeas corpus such as would entitle him to discharge from custody; and that the circuit court has no jurisdiction to supervise or to otherwise control the actions of the Department of Corrections.

The facts elicited at the hearing on respondent's motion to dismiss the habeas corpus petition disclosed that relator had been extradited from Alabama for trial in Illinois on October 17, 1963; that relator was found guilty under Indictments 62-306, 62-307 and 62-308, and sentenced to concurrent terms of ten to fifteen years; that he was returned to Alabama on December 2, 1963, to complete service of a previously imposed sentence in that State; and that he was returned to Illinois on July 21, 1970, to commence service of the Illinois sentence imposed pursuant to his robbery conviction. The court below noted that the time served on the Alabama sentence was not to be applied to the time to be served under the Illinois sentence and therefore sustained respondent's motion to dismiss the petition for writ of habeas corpus.

OPINION

Relator's first contention is that the instant sentence must be considered to have been imposed concurrently with the Alabama sentence since the original mittimus failed to specify whether those sentences were to run consecutively or concurrently and was therefore ambiguous and uncertain. Although the original judgment in the trial court does not appear in the record on appeal, both relator and respondent agree that the judgment contained no language concerning whether the sentence imposed thereunder was to run concurrently with or consecutively to the Alabama sentence. However, relator points to the fact



that the original mittimus failed to recite that the instant sentence was to "be held in abeyance" pending service of the Alabama sentence. He believes that from this we must conclude the mittimus called for commencement of the service of the Illinois sentence in the Alabama prison. It is apparently his contention that this conclusion would require us to find that concurrent sentences were imposed. This argument is without merit. It is the original trial court judgment and not the mittimus issued pursuant thereto that controls the conditions of relator's confinement in Illinois. People v. Troesch, 57 Ill.App.2d 466, 206 N.E.2d 468.

Relator relies upon the cases of People v. Hardgrave, 406 Ill. 211, 92 N.E.2d 464, and People v. Kamrowski, 412 Ill. 383, 107 N.E.2d 725, to support the proposition that sentences which are stated to run consecutively, but which are indefinite and uncertain, will be held to run concurrently. We fail to see their relevance. It is well established that the imposition of two or more sentences to the Illinois penitentiary are presumed to have been imposed to run concurrently unless otherwise specified in the judgment of the court. (People v. Boney, 128 Ill.App.2d 170, 262 N.E.2d 766.) Where, however, the accused is also serving a sentence in a federal or a sister state institution, the contrary is true. Statutory authority to impose Illinois sentences to run concurrently with federal sentences has existed for only one decade. (See Ill.Rev.Stat. 1965, ch. 38, par. 1-7(n); carried forward to Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-6(e).) Statutory authority to impose Illinois sentences to run concurrently with those of sister states is even more recent. Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(f).

We note that relator asserts that he was sentenced under "Ill.Rev.Stat., ch. 38, par. 1-7(m), (n)" which, he claims,



allowed concurrent sentences between Illinois and federal sentences but not between Illinois sentences and those of other states. Section 1-7(n), as we have indicated above, did not come into effect until 1965. Since relator was sentenced in 1963, he cannot claim a denial of equal protection at the time of his sentencing because even federal prisoners did not possess any rights which were not also enjoyed by prisoners of other states. Decisions of this court arising out of post-1965 sentencing are plainly inapplicable to the instant case. See People ex rel O'Meara v. Bensinger, No. 58578, March 14, 1975.

Therefore, since sentences are presumed to be concurrent only if they are to be served in Illinois penitentiaries, we hold that relator's Illinois sentence is to be served consecutively to his Alabama sentence.

Relator has also contended that his plea of guilty to the robbery charge was involuntary since it was made under the mistaken belief that the Illinois and Alabama sentences would be served concurrently. The record discloses, however, that relator did not enter a plea of guilty to that charge but rather that he was found guilty after a jury trial. Clearly, this last contention is utterly frivolous.

For the foregoing reasons the order of the court below sustaining respondent's motion to dismiss relator's petition is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.



3D
201A 305

SEP 17 1975

61040

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
OTIS A. HILL,	)	HONORABLE
	)	JOHN F. HECHINGER,
Petitioner-Appellant.	)	JUDGE PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, First District, Fifth Division.

On March 5, 1973, Otis A. Hill, petitioner, was convicted upon his plea of guilty of the crime of murder (Ill. Rev. Stat. 1971, ch. 38, par. 9-1). He was sentenced to a term of 15 to 30 years. Petitioner did not appeal.

On December 31, 1971, petitioner filed a pro se post-conviction petition pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.). Counsel was appointed to represent petitioner and an amended post-conviction petition was filed. On June 25, 1974, upon motion of the State, petitioner's amended post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal the dismissal of his amended post-conviction petition and the public defender of Cook County was appointed to represent him. After examining the record, the public defender has filed a motion in this court with leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. On February 6, 1975, petitioner was mailed copies of the motion and brief. He



was informed that he had until April 15, 1975 to file any additional points he might choose in support of his appeal. He has not responded.

OPINION

The motion and brief of the public defender state that the first possible argument which could be raised on appeal is that petitioner was entitled to an evidentiary hearing on the allegations in his post-conviction petition that the trial judge in accepting his plea of guilty, failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A, par. 402). The record reflects that when petitioner's case was called for trial on March 5, 1973, defense counsel in petitioner's presence informed the trial court that pursuant to a pre-trial conference which had been held, petitioner wished to enter a plea of guilty. The trial judge admonished the petitioner that he was charged with the crime of murder, detailing all of the facts as alleged in the indictment. Petitioner was admonished that by entering a plea of guilty he would waive his right to remain silent, his right to a jury trial or a bench trial and his right to be confronted by the witnesses against him, including the right to cross-examine each witness. The trial judge informed petitioner that upon a plea of guilty to the charge of murder he could be sentenced to an indeterminate term with a minimum sentence of 14 years. The trial judge also informed petitioner that built into any sentence there would be a mandatory parole period of five years. By questioning the petitioner, the trial judge determined that there had been a pre-trial conference between defense counsel and the assistant State's attorney in which it was agreed that the State would recommend a sentence of 15

to 30 years. The trial judge stated that he was not a party to that conference and was not bound to impose that sentence. Petitioner stated that he understood. The facts which provided a basis for the indictment were then stipulated to by the parties. After a hearing in aggravation and mitigation, the trial judge sentenced petitioner to a term of 15 to 30 years.

In his amended post-conviction petition, petitioner argued that the trial judge failed to question him personally in open court to determine whether any force, threats or promises apart from the plea agreement had been used to obtain the plea of guilty as required by Supreme Court Rule 402(b). In People v. Ellis, 59 Ill.2d 255, 320 N.E.2d 15, the Supreme Court rejected a similar contention holding:

"If upon review of the entire record it can be determined that the plea of guilty made under the terms of a plea agreement was voluntary, and was not made as the result of force, threats or promises other than the plea agreement, the error resulting from failure to comply strictly with Rule 402(b) is harmless."

In the case at bar, petitioner represented by counsel entered his negotiated plea of guilty only after a pre-trial conference. Petitioner was admonished that by entering his plea of guilty he waived his right to confront the witnesses against him and his right to have a jury trial or a bench trial. Petitioner indicated that he understood the results of the pre-trial conference and was aware that the State would recommend a sentence of 15 to 30 years. After all of these admonishments, petitioner persisted in his plea of guilty, which was then accepted by the trial court. Petitioner was then sentenced in accordance with the plea agreement. After a consideration of the entire record, we conclude that



except for those included in the plea agreement petitioner was made no promises and that his plea of guilty was voluntarily entered and was not the result of any force or threats.

In his amended post-conviction petition, petitioner also argued that at the time he entered his plea of guilty the trial judge failed to admonish him that he had an option to be sentenced under the law in effect at the time of the commission of the crime or under the Unified Code of Corrections which was in effect at the time of sentencing. The only distinction between the law in effect at the time of the commission of the crime and the Unified Code of Corrections is that the Code provides for a mandatory parole period of five years. The Supreme Court has held that when a defendant enters a plea of guilty he need not be admonished as to the mandatory parole terms of the Unified Code of Corrections. People v. Krantz, 58 Ill.2d 187, 317 N.E.2d 559.

Here, the petitioner, represented by counsel, entered a negotiated plea of guilty after a pre-trial conference. The trial judge in accepting his plea of guilty carefully admonished the petitioner as to the possible statutory penalties under the Code, including the fact that a parole term of five years was mandatory. Petitioner's plea negotiations were entered into in an attempt to avoid a higher penalty. Petitioner received the sentence agreed to at the trial conference. After a reading of the record it is clear that petitioner was electing to be sentenced under the Unified Code of Corrections as part of his negotiated plea of guilty. Under these facts, we conclude that the admonishments given petitioner were sufficient to constitute substantial compliance



with Supreme Court Rule 402 and that he entered his negotiated plea of guilty voluntarily choosing to be sentenced under the Unified Code of Corrections. People v. Jackson, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 59633, February 25, 1975.)

We have examined the record and concur in the opinion of the public defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

Consistent with the foregoing holding, the motion of the public defender of Cook County to withdraw as counsel on appeal for the petitioner is allowed and the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.



3D
287A 574
PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
v.)
DONALD E. WRIGHT,)
Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
FRED G. SURIA,
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

The defendant, Donald E. Wright, was charged in indictment No. 72-2505 with the offense of murder. Pursuant to plea negotiations between the state's attorney and defense counsel, Wright changed his plea from not guilty to guilty to the charge of voluntary manslaughter. After being admonished by the court in accordance with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A), he was found guilty of voluntary manslaughter and sentenced to a term of 6 to 12 years in the penitentiary on November 28, 1972.

On February 16, 1973, defendant filed a pro se petition for relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, § 122-1 et seq.), alleging that his sentence did not conform with the American Bar Association recommendation that the minimum sentence should not exceed one-third of the maximum. The public defender of Cook County was appointed to represent defendant and filed a supplemental petition on his behalf. At a hearing before the Honorable Fred G. Suria on June 11, 1974, the pro se and supplemental petitions were dismissed on motion of the State. Defendant thereupon filed a notice of appeal from the order dismissing his post-conviction petitions.

Defendant's appointed counsel, the public defender of Cook County, filed a motion to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396. In his motion and brief, counsel asserts that he



has reviewed the record and found no meritorious issues to be raised on appeal that are not frivolous. Copies of the public defender's motion and brief were mailed to defendant on March 7, 1975. He was further advised that he had until May 12, 1975 to file any points he desired in support of his appeal, after which date the court would make a full examination of all proceedings and decide whether the appeal is wholly frivolous. Defendant has not responded.

We have made an independent examination of the record in the instant case and concur in the opinion of the public defender that there are no grounds that could support a successful appeal. The Unified Code of Corrections provides that the minimum term of imprisonment shall not be greater than one-third of the maximum set by the court. (Ill. Rev. Stat. 1973, ch. 38, § 1005-8-1(c)(3).) However, the Code became effective on January 1, 1973 and was applicable to offenses that had not reached the sentencing stage or a final adjudication. (Ill. Rev. Stat. 1973, ch. 38, § 1008-2-4.) In this case, the defendant was sentenced on November 28, 1972 and no appeal was perfected from either the conviction or the sentence. Hence, the offense for which defendant was prosecuted had reached a final adjudication prior to the effective date of the Code of Corrections.

In view of the foregoing, the motion of the public defender of Cook County for leave to withdraw as counsel is granted, and the judgment of the circuit court of Cook County is affirmed.

Motion granted.
Judgment affirmed.

DIERINGER, P.J. and ADESKO, J., concur.

Abstract only.



)
)
APPEAL FROM THE
CIRCUIT COURT
) OF COOK COUNTY.

HONORABLE
) EARL E. STRAYHORN,
) PRESIDING.

The defendant, Daniel Steele, was charged with unlawful use of a weapon and the armed robbery of Joseph Hayes. The trial court sustained the defendant's motion to suppress physical evidence and the identification testimony of Joseph Hayes. The State appeals pursuant to Supreme Court Rule 604. Ill.Rev.Stat. 1973, ch. 110A, par. 604 (a)(1).

David Oglesby, a City of Chicago policeman, testified that he and his partner were assigned to beat 706 and were driving in a marked squad car at 11:30 p.m. on May 6, 1971, in the vicinity of 6747 South Halsted Street when they were "flagged down" by a man that Oglesby had seen before but whose name he did not know. The man said there was another man in the tavern with a gun who was described as wearing a black jacket, black trousers and a black and white cap and having a cast on his left hand. Oglesby went into the tavern and the defendant, who fit the description, came toward him. Oglesby asked the defendant if he had a gun and the defendant said, "Yes." Oglesby drew his revolver and the defendant gave him the gun he had on his person.

Contrary to his testimony on the motion, Oglesby testified before the Grand Jury that he first saw the defendant outside the tavern and he arrested him at that time.

Earl Marshall testified that he and his partner, John Palmer, were assigned to beat 763 and were called to assist Officer Oglesby with the arrest of a man with a gun at 6747 South Halsted. They went to the location but the police officers were not there. He met the arresting officers, Oglesby and Johnson, at the station. Oglesby wanted Marshall to assist with the paper work and to process the defendant. While Marshall was making out the arrest report, the defendant emptied his pockets onto the table together with his wallet and said, "Check this out." There were a number of identification cards and charge cards which were in the name of Joseph Hayes. The defendant had only a general assistance card with his own name and address. Marshall did not observe the line-up nor did he see Hayes. His only participation was to write up a report and to check out Hayes' identification.

When questioned by the court, Marshall said he met Oglesby at the station; but Oglesby had left the station before Marshall and his partner found Hayes' identification. Marshall said that Oglesby made the arrest, that he was not present at the time and that he did not know any of the facts leading up to the arrest other than what he learned from Oglesby.

He prepared the original arrest report which, contrary to his trial testimony, stated there was an "on view arrest by beat 706 [Oglesby and Johnson] and 763 [Marshall and Palmer]". The report also said that the defendant was observed "exiting from" the tavern with his right hand behind his back; that Oglesby grabbed his hand and removed a pistol from it; and the defendant was transported to the 7th District with the assistance of Marshall and Palmer. When testifying before the Grand Jury, Marshall said, contrary to his hearing testimony, that when he went to 6747 South Halsted he saw the defendant.



After the trial court had completed questioning Marshall, he stated that he was going to sustain the motion because the police officers were lying and gave reasons for his view. When the State's Attorney asked for a finding of fact, the court said:

"I will give you a finding of fact.

"The court finds as a matter of fact that on the 7th day of May, 1971, the defendant Daniel Steele was in or about the vicinity of 6747 South Halsted Street. That at that time he was arrested by David Oglesby who at that time had no legal cause for the arrest. He purportedly had received information from a person that he had seen in the neighborhood for some six months, who gave him information that some person was in the tavern with a gun and gave him a purported description. No purported description fitting that person appears in any report that I have seen.

"Furthermore, the court finds as a matter of fact, that Officer Oglesby said that as he entered the tavern on the night in question that the defendant was approaching him, that he stopped the defendant and asked him, 'Do you have a gun,' and the defendant said 'Yes,' and gave it to him.

"The report that I have just read indicates that Officer Oglesby says in his official police report that as he walked into the tavern he saw the man who he now identifies as the defendant walking toward him with his right hand behind his back and that he, Officer Oglesby, grabbed the offender as he walked past and searched him and removed the pistol. There is a diametrically opposed difference between his supposed official police report and the matters that he has testified under oath here today.

"The court finds as a matter of fact, that the Officer Oglesby had no just, reasonable cause for the arrest of this defendant, regardless of whether the arrest occurred as he testified under oath or the arrest occurred as he testified, or as he indicated in his official police report, * * * ."

The next day the court apologized to the officers for the remarks he had made, and the following occurred:

"STATE'S ATTORNEY: Well, your Honor, I would ask the court to reconsider its ruling in the light of the court's remarks made on the record today with respect to the case of Daniel Steele. I do not know if he is yet in custody and, therefore, I would have no motion with respect to the motion we made yesterday 'S.O.L.'ing' the causes.

"THE COURT: No, I have considered this overnight; my legal ruling could have been made based upon the evidence. There is a possibility that an honest mistake was made. Certainly, my finding



of fact I believe will support the facts, that there was no legal basis for the arrest here, and the fact that I have seen fit to apologize to these two officers for the attack that I made upon them personally doesn't change my legal ruling. I am not going to change that, * * *."

Motions to suppress evidence often involve, as this one does, a mixed question of law and fact. And the trial judge is invested with some discretion in determining whether particular facts constitute reasonable grounds for an arrest. Reviewing courts should substitute their judgment for that of the trial judge only in those cases where his decision is against the manifest weight of the evidence or is based on an erroneous legal theory. The Criminal Code provides that the order granting or denying the motion to suppress shall state the findings of fact and conclusions of law upon which the order was based. (Ill.Rev.Stat. 1973, ch. 38, par. 114-12(e).) The purpose of this provision is to permit a reviewing court to determine whether the trial judge's findings of fact are supported by credible evidence or whether he has misconstrued the law. In this case, however, we cannot say, as the defendant urges, that the trial court made its decision based on its original rejection of the officers' testimony. If it had done so, we would be in no position to gainsay its determination of a factual question since their credibility was by no means to be accepted as a matter of law. The State has offered persuasive arguments if the officers had been tried for perjury; but anyone reading the report and Grand Jury testimony would reasonably conclude that Marshall participated in the arrest and the seizure of the gun and that Oglesby arrested the defendant outside the tavern and forcibly took the gun from him.

But the statements the trial court made in its findings of fact and on the following day create the impression that his decision was based on the law applicable to the facts as established, assuming the truthfulness of the officers' testimony in court. He found that Oglesby had no reasonable cause for the arrest "regardless of whether the arrest occurred as he testified or as he indicated in his official report." He also said that his "legal ruling could have been made



based upon the evidence" and that "there was no legal basis for the arrest." We judge from these remarks that the court was holding that he was compelled as a matter of law to hold that there was no reasonable basis for the arrest. That legal conclusion was erroneous. Arrests based on information given by unidentified private citizens have been upheld. (People v. Hoffman, 45 Ill.2d 221, 258 N.E.2d 326; In re Boykin, 39 Ill.2d 617, 237 N.E.2d 460; People v. Thompson, 3 Ill.App.3d 470, 278 N.E.2d 462.) In our view, if the trial court had believed Oglesby's testimony, it could have upheld the arrest.

This case illustrates a procedural practice in the preparation of reports that police administrators should vigorously discourage and prosecutors, who must depend on those reports in the preparation of their cases, should condemn in strong terms. The trial court was understandably provoked by the contradictions between the officers' testimony at the hearing and their testimony before the Grand Jury and their report. And we can understand the court's irritation because the report's recitation of the description given had no mention of a cast on the hand of the defendant, which is far more significant than a black and white hat, a black jacket and black pants. But, as we have indicated, we are not sure of the reason for its ruling and it may have been an invalid one. For this reason we believe this cause should be remanded for a new hearing on the motion to suppress and for further proceedings not inconsistent with this opinion.

People v. Tate, 38 Ill.2d 184, 188, 230 N.E.2d 697.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. and GOLDBERG, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE
) CIRCUIT COURT
) OF COOK COUNTY.
 v.)
) HONORABLE
 VINCENT J. BADALAMENTI and GARY K. GEISSER,) JOHN GANNON,
) PRESIDING.
 Defendants-Appellants.)

Mr. JUSTICE EGAN delivered the opinion of the court:

The defendants, Vincent J. Badalamenti and Gary K. Geisser, were found guilty of theft of property in the value of \$20. Badalamenti was sentenced to four years' probation with the first 60 days to be served in the County Jail and Geisser was sentenced to two years' probation. They raise a number of points, but the one we believe dispositive is their contention that they were not proved guilty beyond a reasonable doubt.

On February 22, 1973, Badalamenti drove a car into the gas station at Route 58 and Roselle Road in Hoffman Estates with Robert Tanner and Gary Geisser as passengers. The station attendant, Richard Quinn, testified that "they" asked for 50 cents worth of gas and that he put the gas in the tank. He left to attend another car and when he got back to the car "they" wanted the transmission fluid checked. He told them to pull up near a light in the garage and went to attend another customer. When he went inside Tanner was there making a telephone call. Tanner asked him how to get to Des Plaines. Quinn told him and then went outside and checked the transmission fluid. "They" were wiping the windows and then "they" asked for more gas. Later, "they" wanted something else checked but he did not remember what it was. After the car drove away he went to the register and noticed that three or four five-dollar bills were missing. He called the police and gave them a description of the car. The defendants and Tanner were arrested 15 minutes later and Quinn identified them that night at the police station. He testified that Badalamenti and Geisser were never in the gas station.

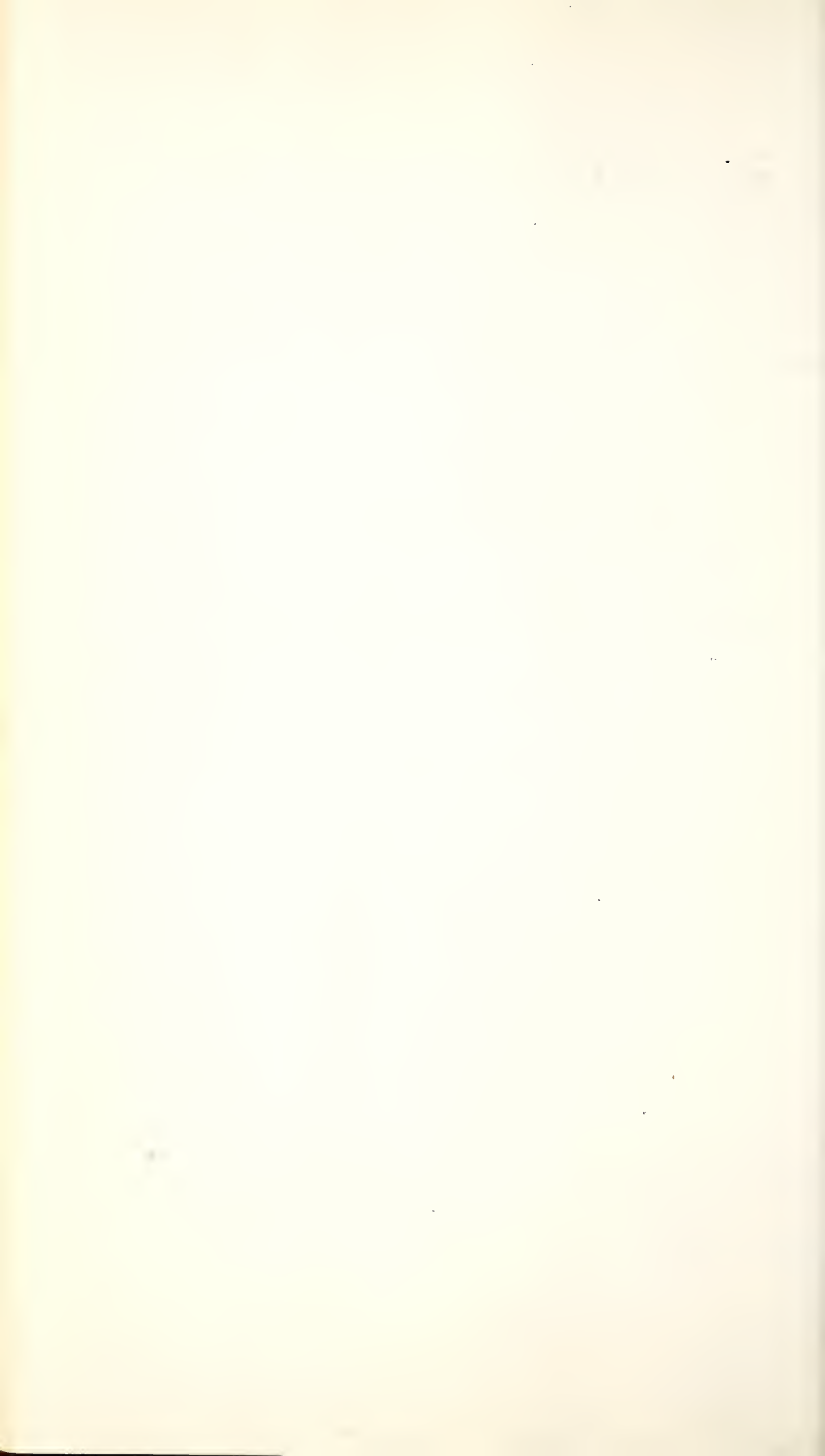
Both defendants had known Tanner about six months. Badalamenti testified that he was going to buy the car he was driving from Tanner, who was sitting in the front passenger seat. Both defendants denied any knowledge that Tanner had intended to take any money from the station. No evidence was introduced to show that any money was recovered from either defendant.

The State argues that the evidence shows the defendants' guilt under the accountability statute (Ill.Rev.Stat. 1971, ch. 38, §5-2(c)), which provides that one is legally accountable for the conduct of another if "with the intent to promote or facilitate" the commission of an offense, "he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." The State contends that the evidence shows that the defendants aided and abetted Tanner by distracting the gas station attendant by asking for 50 cents worth of gas and to have the transmission fluid checked, wiping their own windows, asking Quinn to check some other item and for more gas. The record is not clear what individual spoke to the attendant in making these requests. Tanner may have made some of them. But even if it were clear that each of the defendants made the requests, the most we could say of the State's case is that it creates a suspicion. But it is not proof beyond a reasonable doubt. The judgments of the circuit court are reversed.

JUDGMENTS REVERSED.

BURKE, P.J. and SIMON, J. concur.

ABSTRACT ONLY.



291A, 377



60680

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RICKY WILLIAMS,	)	HON. KENNETH R. WENDT,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

On November 5, 1970, Ricky Williams (defendant) pleaded guilty to two charges of armed robbery. The trial court placed him on probation for four years. On October 2, 1973, a warrant was issued for violation of probation on the ground that he had committed an additional armed robbery. On October 25, 1973, after a full hearing, the trial court revoked his probation and he was subsequently sentenced to concurrent terms of five to six years in the penitentiary upon each of the two indictments. At this hearing, it developed that on October 9, 1972, the latest charge of armed robbery was dismissed for want of prosecution at a preliminary hearing before the municipal division of the circuit court because of refusal of the complaining witnesses to testify.

Defendant appeals, raising as his only point the argument that the State circumvented "his right to jury trial and proof beyond a reasonable doubt" so that there was a denial of due process in the revocation of probation.

Upon examination of the record, we find that the evidence offered by the State concerning subsequent armed robbery was ample to prove the guilt of defendant by a preponderance of the evidence. Proof of guilt by this evidential standard is sufficient to support the order revoking probation. (People v. Crowell, 53 Ill. 2d 447, 451, 292 N.E. 2d 721; Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(c).) We therefore conclude that the revocation of defendant's probation was not against the manifest weight of the evidence. An opinion by this court would have no precedential value.



We find that no error of law appears in this record. A sentence of probation under the Unified Code of Corrections includes a condition that defendant shall "not violate any criminal statute of any jurisdiction." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-3(a)(1).) In addition, the trial court has power to terminate probation "if warranted by the conduct of the offender and the ends of justice." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-2(c)); or, if "the offender has violated a condition at any time prior to the expiration***" of probation (par. 1005-6-4(e).) The State did not circumvent any of the defendant's rights by the procedure here so that there was no denial of due process in the revocation of probation. A number of decisions by this court hold that a defendant need not be indicted or prosecuted for, or convicted of, the subsequent offense which constituted the basis for revocation of his probation. People v. Johnson, 12 Ill. App. 3d 511, 513, 299 N.E. 2d 545; People v. Witherspoon, 9 Ill. App. 3d 317, 320, 292 N.E. 2d 202 and People v. Mosley, 2 Ill. App. 3d 375, 377, 276 N.E. 2d 455.

The judgment appealed from is affirmed in accordance with Rule 23 of the Supreme Court of Illinois, 50 Ill. 2d R. 23.

JUDGMENT AFFIRMED.

BURKE, P. J., and EGAN, J., concur.

(Abstract Only).



61111

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
v.)
JAMES COVINGTON,)
Petitioner-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
MARVIN E. ASPEN,
PRESIDING.

PER CURIAM (First Division, First District).

Before BURKE, P.J., EGAN, J. and SIMON, J.

James Covington, petitioner, entered a plea of guilty to the offense of armed robbery and was sentenced to a term of five years to five years and one day; no appeal was taken from that judgment. His subsequently filed petition for relief under the Illinois Post-Conviction Hearing Act was dismissed without an evidentiary hearing upon respondent's motion and he appealed. Ill.Rev.Stat. 1973, ch. 38, par. 122-1 et seq.

The public defender of Cook County was appointed as counsel for the petitioner on this appeal and has filed in this court a motion for leave to withdraw as appellate counsel pursuant to Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, on the ground that the appeal is frivolous; the motion is supported by a brief in accordance with the Anders decision, wherein appellate counsel advances several issues which could be raised on the appeal but which he concludes, in final analysis, to be without merit and not supportive of the appeal. Copies of the motion and the brief were forwarded to petitioner in February, 1975, and he was allowed until April 20, 1975, to file any points he desired in support of the appeal; he has not responded.

Petitioner filed the instant verified pro se post-conviction petition alleging that he was forced to plead guilty to the offense, in violation of Supreme Court Rules 402, 411, 412, 413, and 414, having been advised that he would receive a higher sentence if he went to trial; that he was denied his right to confront witnesses,

to a jury trial and to adequate assistance of counsel, and that the sentence imposed was excessive because it exceeded the one-to-three ratio established by the Unified Code of Corrections and because petitioner was only 18 years of age at the time of the offense and was therefore not responsible for his actions. No affidavit was filed in support of the petition, nor were facts or other evidentiary matters alleged or stated in the petition.

Attached to respondent's motion to dismiss the post-conviction petition was a copy of the transcript taken at the change of plea hearing. That transcript discloses a literal compliance by the trial court with the requirements of Supreme Court Rule 402; the court fully and painstakingly admonished and secured responses from petitioner concerning his rights and his understanding of those rights, and petitioner understandingly and knowingly entered a waiver thereof. That transcript effectively disposes of petitioner's claims with respect to his plea of guilty and the denial of his rights to confront witnesses and to a jury trial. (See People v. Mendoza, 48 Ill. 2d 371, 270 N.E.2d 30; People v. Lynch, 11 Ill.App.3d 479, 297 N.E.2d 382; Ill.Rev.Stat. 1973, ch. 110A, par. 402.) The lack of affidavit or other factual matter to support the allegation of inadequate representation of counsel also disposes of that allegation. People v. Lynch, 11 Ill.App.3d 479, 297 N.E.2d 382.

Petitioner's claim that his sentence is improper because of his age is patently without merit; whatever benefits he could have expected in that regard was governed by the provisions of the Juvenile Court Act, which did not apply to persons of his age. (Ill.Rev.Stat. 1973, ch. 37, par. 701-1 et seq.) Further, the length of petitioner's sentence, of itself and without more, will not constitute a ground for relief under the Post-Conviction Hearing Act. People v. Null, 13 Ill.App.3d 60, 299 N.E.2d 792.

Petitioner's claim, that the minimum term of sentence should not have exceeded one-third the maximum term, is likewise without merit. The one-to-three ratio established by the Unified Code of Corrections was not in effect at the time defendant was sentenced for this offense. (See Ill.Rev.Stat. 1973, ch. 38, par. 1001-1-1, 1008-6-1.) More importantly, the one-to-three ratio provision is, and was, not applicable to felonies such as armed robbery. See Ill.Rev.Stat. 1973, ch. 38, pars. 18-2(b), 1005-8-1.

We are in agreement with appellate counsel that the matters raised in the brief in support of his motion for leave to withdraw are without merit and will not support the instant appeal. Upon independent review of the record in discharging our duty under the Anders decision, a single matter appears which could be raised on appeal but which, in final analysis, is without merit and will not support the appeal.

As noted by petitioner's counsel at the hearing on the motion to dismiss the petition, no appeal was taken from the judgment entered against petitioner in the original case; that judgment was entered on September 29, 1972, about three months prior to the date on which the Unified Code of Corrections was to take effect on January 1, 1973. Circumstances somewhat bearing on the instant situation were considered in the cases of People v. Custer, 11 Ill.App.3d 249, 296 N.E.2d 753, and People v. Pierce, 21 Ill.App.3d 705, 315 N.E.2d 572 (abst.). In Custer, a petition for rehearing filed as to a decision of the appellate court handed down on December 27, 1972, was held to extend the pendency of the appeal beyond the effective date of the Unified Code of Corrections so as to have allowed the defendant the benefit of its ameliorated sentencing provisions. In Pierce, on the other hand, no petition for rehearing was filed from the Supreme Court decision handed down on November

30, 1972, and the appellate court in a subsequent post-conviction proceeding held that such inaction did not constitute incompetence of counsel on the direct appeal for one reason that 32 days would have had to elapse before the effective date of the Code, whereas the Supreme Court's mandate would have and did issue prior thereto.

In the instant case, petitioner did not appeal from the judgment of conviction entered upon the plea of guilty. He was not advised of his right to appeal because there was no requirement at that time that he be so advised inasmuch as his conviction resulted from a plea of guilty and not from a trial. (See Ill.Rev. Stat. 1971, ch. 110A, par. 605; People v. Burnett, 45 Ill.2d 521, 262 N.E.2d 477.) The judgment of conviction became final prior to the effective date of the Code and petitioner therefore is not entitled to the benefit of its ameliorated sentencing provisions. Compare minimum terms: Ill.Rev.Stat. 1971, ch. 38, par. 18-2(b), and Ill.Rev.Stat. 1973, ch. 38, pars. 18-2(b), 1005-8-1.

Upon review of the matters raised in appellate counsel's brief in support of his motion for leave to withdraw and upon independent review by this court of the record in this case, no issue appears which would support this appeal. The motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed and the judgment appealed from is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

No. 59004

3D
281A 581



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
MICHAEL GRIFFIN,	)	DANIEL J. WHITE,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos and Leighton, JJ.

PER CURIAM

Michael Griffin, defendant, was charged with the offense of battery in that he knowingly, without legal justification, caused bodily harm to Theresa Evans, in violation of Section 12-3 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 12-3.) After a bench trial, defendant was found guilty and sentenced to six months in the House of Correction. On appeal, defendant contends that he did not knowingly and understandingly waive his right to a jury trial; and that he was not proven guilty of battery beyond a reasonable doubt.

Theresa Evans, the complaining witness, testified that during the evening of July 11, 1972, she was sitting with friends on a bench in the park across the street from her apartment when she saw defendant, whom she knew only by his first name. On returning home from the park, Ms. Evans discovered she had lost her key to the front door of her apartment and could not get in. She went back to the park to search for her keys but could not find them. Defendant asked if she needed help in getting into her apartment. They went back to her apartment, and defendant climbed through the bathroom window and opened the front door.

After she got into the house she offered defendant two dollars but he refused to take it. Defendant said "I'll show you what I want" and he then grabbed her and began to choke her. Defendant pushed her back inside the door where her three children, ages 8, 7, and 2, were sitting on the floor looking at TV. Ms. Evans told defendant that she would do anything so



long as he did not hurt her children. She said that when her daughter started to cry "because she could hear him evidently beating my head on the floor," defendant told Ms. Evans if she didn't do as he said, he was going to kill her and her children. Defendant picked up a leg from the girl's metal table and told Ms. Evans that if she did not stop the child from crying he was going to hurt her. Ms. Evans said defendant was lying on top of her and hitting her; that he hit her in the nose with his fist many times and then he fell off to sleep with one of his arms around her neck. After about two and a half hours she was able to free herself from his grasp. She ran to her mother's house and called the police. She stated defendant took off her clothes and that she was in bed with defendant for quite awhile. Defendant was still in the apartment when the police arrived.

Ms. Evans further testified that when she and defendant were in the apartment he was constantly hitting her in the face, nose and legs, so she had a bruise on her leg and under her eye; and that she was treated at Billings Hospital. Ms. Evans identified People's Exhibit No. 1 for identification as the leg from her daughter's table which the defendant used when he struck her. On cross-examination, Ms. Evans stated that she bled from her nose; and that she was not bleeding when the police officer came to her apartment.

Chicago Police Officer Dan McInerney, who responded to Ms. Evans's call, testified that he spoke to her in the courtyard in front of the apartment building; and that at the time he did not notice she was bleeding in any way and did not see any bruises on her face or any part of her body. He said that when he entered the apartment he found defendant asleep on the bed with only his T-shirt on, no trousers or underpants, and the three children were sleeping on the floor. On cross-examination, McInerney said he first saw the table leg on the bed; and that defendant, who was asleep, had his hand over it. On redirect examination, McInerney said that he woke defendant. He also

stated that when he first talked to Ms. Evans in the courtyard she was crying and she told him that she had a bump on her head; and that he felt the back of her head and it felt like a bump.

Defendant testified that he first met Ms. Evans in the park about 10:00 or 11:00 P.M. on July 11; that at the time he was with Michael Robinson and Phillip Gary; that Ms. Evans was looking in the grass for a key; and that then Ms. Evans and Robinson left and later came back. Robinson said he could not get through the window so defendant, Ms. Evans and her children went across the street to her apartment. The defendant said he crawled through the window of the bathroom and walked to the front door and let her and her children in; that he then asked her if he could have sexual intercourse with her; that she said "O.K." and they went into the bedroom and she was lying in the bed with no clothes on; that he got on top of her and had sexual intercourse with her; and that then he went to sleep. Defendant said the police came and woke defendant up and said he was under arrest for rape. On cross-examination, defendant said that he never struck Ms. Evans, and that she did not offer any resistance when he told her he was going to have sexual intercourse with her. Defendant said he never hit her in the face, or on the leg, and that he never touched the table leg. On redirect examination, defendant said that he had sexual intercourse with Ms. Evans about 11:00 P.M.; and that the police came about 4 or 5 o'clock in the morning.

Defendant argues that he was not proven guilty of battery beyond a reasonable doubt. He was charged with a violation of Section 12-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-3), which provides:

"(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."

The complaint alleged that on or about July 11, 1972, defendant committed the offense of battery in that he "knowingly, without

legal justification caused bodily harm, bump on head and bruises on legs to Theresa Evans in violation of Chap. 38, Section 12-3."

It should also be noted that Section 3-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 3-1) provides:

"Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt."

Ms. Evans testified that defendant threatened her and her children with a metal leg from her daughter's table; that defendant was constantly hitting her in the face, nose and legs, so that she had a bruise on her leg and her eye; that defendant struck her once on the leg with the metal table leg; and that she bled from her nose but she was not bleeding when the police officer came to her apartment. However, her testimony becomes suspect in light of other testimony in the record. Chicago Police Officer Dan McInerney testified that he spoke to Ms. Evans in the courtyard in front of the apartment building shortly after the incident; and that at the time he did not notice she was bleeding in any way and did not see any bruises on her face or any part of her body. He said she did tell him she had a lump on her head; that he felt the back of her head; and that it felt like a bump. McInerney further testified that when he entered the apartment he found defendant asleep on the bed with only his T-shirt on, no trousers or underpants, and the three children were sleeping on the floor; and that defendant, asleep, had his hands over the table leg which was on the bed.

Defendant testified that Ms. Evans consented to have sexual intercourse with him; and that he was asleep when the police came, woke him up, and said he was under arrest for rape. Defendant further testified that he never hit Ms. Evans in the face, or on the leg; and that he never touched the table leg. In our opinion, the fact that the State nolle prossed the rape charge and filed a new complaint alleging the offense of battery

casts grave doubt upon the credibility of Ms. Evans.

Defendant contends that "[i]t is extremely improbable that the defendant would brutally beat and rape someone who knew him and then relax in the victim's apartment while the victim sought help. Such a situation would be improbable and contrary to human experiences." Although Ms. Evans and defendant had sexual intercourse about 11:00 P.M., the police did not come until about 4 or 5 o'clock in the morning. During this time defendant slept and Ms. Evans lay there for about two and a half hours with one of the defendant's arms around her neck.

A review of the testimony shows that the evidence relating to the material facts and issues was conflicting and cannot be reconciled. Under such circumstances, in a bench trial it is the duty of the trial court to determine the credibility of the witnesses and the weight to be given their testimony. (People v. Catlett (1971), 48 Ill. 2d 56, 268 N.E.2d 378; People v. Arndt (1972), 50 Ill. 2d 390, 280 N.E.2d 230; People v. Spriggs (1st Dist. 1974), 20 Ill. App. 3d 804, 314 N.E.2d 573.) On appeal, the determination of the trial judge, who has the opportunity to review the witnesses and hear their testimony, will not lightly be set aside. (People v. McGhee (1st Dist. 1974), 20 Ill. App. 3d 915, 314 N.E.2d 313; People v. McNeal (1st Dist. 1972), 8 Ill. App. 3d 109, 289 N.E.2d 193.) But it is always the duty of the court to examine the evidence in a criminal case, and if it is so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt, the conviction will be reversed. In People v. Coulson (1958), 13 Ill. 2d 290, 149 N.E.2d 96, the court reversed the convictions of two defendants because the State's evidence was improbable, unconvincing and completely unsatisfactory. The court stated that the evidence presented by the State was not credible to the extent that it was "contrary to the laws of nature, or universal human experience." The court concluded that a reviewing court is not bound to believe the evidence because "[i]f a conviction is to be sustained,

it must rest on the strength of the People's case and not on the weakness of the defendant's case." 13 Ill. 2d at p. 296.

In People v. Eyre (1st Dist. 1967), 83 Ill. App. 2d 123, 227 N.E.2d 120, the court held at pp. 133-34:

"The evidence in this case, together with the reasonable inferences to be drawn, is so improbable and unsatisfactory as to justify a reasonable doubt of defendant's guilt."

In the instant case, it is apparent that the State failed to prove defendant guilty beyond a reasonable doubt. (People v. Jones (1st Dist. 1973), 14 Ill. App. 3d 280, 302 N.E.2d 358.) Further, there is doubt as to whether defendant caused bodily harm to Ms. Evans by the blows with which he was charged. Since Section 12-3 of the Criminal Code requires the person to be harmed, defendant cannot be convicted of violating Section 12-3 without proof beyond a reasonable doubt that Ms. Evans was harmed. (See People v. Crane (5th Dist. 1971), 3 Ill. App. 3d 716, 279 N.E.2d 134.) Her testimony that defendant was constantly hitting her in the face, nose and legs, so that she had a bruise on her leg and under her eye was contradicted by the defendant and not affirmed by the police officer who stated that he spoke to Ms. Evans shortly after the alleged battery, and that at the time he did not notice she was bleeding in any way and did not see any bruises on her face or any part of her body.

In People v. Semenick (1935), 360 Ill. 250, 195 N.E. 671, the court said at p. 254:

"While the weight of the evidence is for the court or jury to determine, yet where the verdict or judgment is palpably contrary to the weight of the evidence, or the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt, it is the duty of this court to reverse the judgment. People v. Holton, 326 Ill. 481; People v. Rice, 323 id. 580; People v. Nemes, 347 id. 268."

The evidence in the present case is so improbable and unsatisfactory as to justify a reasonable doubt as to defendant's guilt.

In view of the foregoing it is unnecessary to discuss

defendant's argument that he did not knowingly and understandingly waive his right to a jury trial.

The judgment of the circuit court of Cook County is reversed.

Judgment reversed.

(Publish abstract only.)



No. 60255

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
ALBERT MILLS,	)	JAMES BAILEY,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos and Leighton, JJ.

PER CURIAM

Albert Mills, defendant, was found guilty after a bench trial of the offense of burglary, in violation of Section 19-1 of the Criminal Code, and sentenced to a term of two years to ten years. (Ill. Rev. Stat. 1969, ch. 38, par. 19-1.) On appeal he contends there existed a fatal variance between the indictment and the proofs; the State failed to prove ownership of the premises burglarized as alleged in the indictment; the State failed to prove him guilty beyond a reasonable doubt of the offense of burglary; and the trial court abused its discretion in denying his request for probation pursuant to the provisions of the Illinois Dangerous Drug Abuse Act.

Two Chicago police officers testified for the State at the trial which commenced September 27, 1972, that at about noon on February 19, 1971, they and a third officer, all members of the police department's tactical unit, responded to a radio call of a prowler in a four-story apartment building located at 1421 North Dearborn Street in the city; the officers were dressed in civilian attire and were riding in an unmarked police car. Upon their arrival at that location, two of the officers were admitted through the front security door of the building by, and held a conversation through the building's intercom system with a second floor resident, Miss Yuille; the third officer meanwhile proceeded to the rear of the building and positioned himself outside the rear door, which had been locked from the inside. The two officers inside the building searched the upper

floors and stairways, after which they proceeded to the rear, ground level where they admitted the third officer into the building. All three officers then continued into the basement, where defendant was observed holding a long screwdriver in "close proximity" to the lock on one of the storage lockers situated in the basement; the area was lighted by artificial lighting.

One of the officers announced his office and told defendant to stand where he was. Defendant looked in the officers' direction, and put the screwdriver under his coat and into the waistband of his pants, after which he was placed under arrest, searched and advised of his constitutional rights. Defendant was then taken outside, to the front of the building, where he made a statement to the officers and in the presence of a fourth, uniformed officer, that he was in the building looking for a lady friend named Anne Harding. A check of the building mailboxes, and questioning of the building manager, failed to disclose knowledge of such person in residence there. Defendant was then transported directly to the police station, where he was charged with attempt burglary and possession of burglary tools.

The officers' testimony further discloses that after his arrest, defendant was asked routine questions concerning the use of drugs, and an inspection of his arm disclosed needle marks but no fresh blood; he did not appear to have been "high" or intoxicated at the time of his arrest. A person at the real estate firm which managed the building executed a complaint in the matter later that day. The officers were questioned extensively on cross-examination concerning the physical layout of the 1421 Dearborn building, the description of the defendant, and whether the defendant had been transported to the real estate office or to the police station immediately upon his arrest. The officers had been in the basement with the defendant for a period of two to five minutes, and the screwdriver seized from defendant was admitted into evidence.

The attorney for the real estate firm testified for the State and related that he was also a resident of the 1421 Dearborn building and a beneficiary of the land trust under which title to the premises was held. The witness testified that title to the premises was in the Cosmopolitan National Bank and Trust Company, as trustee under a land trust; he described the security door and the doorbell system in the building; and he stated that he did not give defendant permission to enter the building on the day in question. The building records for the years 1969 through 1971 disclosed no one named Anne Harding in residence there. Lights in the basement of the building were left burning continuously.

Miss Yuille testified for the State that she had been asleep in her second floor apartment on the day in question, when she was awakened by her doorbell about 10:00 in the morning; she ignored the bell because she had not been expecting anyone. She also heard doorbells ringing on and off in the other apartments for the next hour and a half, after which she heard the front door to the building open and close and heard light footsteps in the halls; she heard someone knocking on doors to other apartments and heard doorknobs turning. After she observed the knob on her apartment door move, she telephoned the police, who arrived "in just a matter of minutes." She spoke to the officers but did not admit them into her apartment, and then heard them running through the halls and upstairs. She spoke to the officers about ten minutes later, at which time they indicated that they had apprehended someone in the basement of the building. Miss Yuille did not see the person whom she had earlier heard in the building.

Defendant, age 41, testified in his own behalf that on the morning of February 19, 1971, he purchased and used a quantity of heroin in the vicinity of Loomis Avenue and Roosevelt Road in Chicago. He thereafter boarded an eastbound bus to Clark Street and then proceeded northbound on Clark, intending to visit friends at Wells and Goethe Streets. He testified that

he overstayed the ride and alighted from the bus at North Avenue, at which time he decided to visit a lady friend named Marie Pollock who resided at 1430 North Dearborn Street; he had seen Pollock the month before at Clark and Dearborn Streets (sic). He proceeded to 1430 Dearborn and when he determined that Pollock no longer resided there, he crossed the street to the building in question, 1421 North Dearborn Street, thinking that she may have moved there; Pollock had told him that she had a friend who lived in the 1421 Dearborn building, but he could not recall the name. After determining that Pollock was not in residence at the 1421 Dearborn building, and without ringing any doorbells or attempting to open the front security door, defendant exited that building and was placed under arrest by a uniformed police officer on the front sidewalk; six or eight other officers, in civilian clothes, exited the 1421 Dearborn building and joined in the arrest. Defendant was searched, but nothing was found on his person, and the police questioned two construction workers from the area, who stated that they did not know the defendant and whom defendant has tried, without success, to locate as defense witnesses to his arrest outside the 1421 Dearborn building. Defendant was then transported to a real estate office in the 2000 block of North Clark Street, where a trespass complaint was executed in the matter, after which he was transported to the police station. At the station one of the officers present took a screwdriver from a drawer, which contained an assortment of screwdrivers, and thrust it to defendant's stomach, stating that it belonged to defendant and indicating that he should be charged with attempt burglary; defendant testified that he denied ownership of the screwdriver and returned it to the officer. Defendant denied entering the basement of the 1421 Dearborn building on February 19, 1971; he denied possessing a screwdriver while in that building; and he admitted the occasional use of heroin. He further testified that he had been in the state drug abuse program prior to his incarceration in September 1971, at which time his

association with the program terminated, and that he had since re-entered the program in March 1972.

Upon making its finding of guilty, the trial court ordered a pre-sentence investigation made of defendant's background and expressly requested information concerning defendant's response to the drug abuse program.

During the hearing in aggravation and mitigation held on October 20, 1972, it was disclosed that defendant had several prior convictions for burglary and larceny, dating back to 1951. Defense counsel noted to the court that the instant offense involved no victim, that no property had been taken, and that defendant was under the influence of heroin at the time of its commission; counsel requested that the court "consider probation and the drug abuse program" under the circumstances. A representative of the Illinois drug abuse program testified in defendant's behalf, stating that defendant was then in the program and was "progressing well"; that he had "turned the corner" and was on the way to rehabilitation; that the records of the program indicated that defendant had not used heroin for six months and was then on methadone; and that he had attended the meetings scheduled by the program and, given more time, could be rehabilitated. A letter from an attorney connected with the drug abuse program appears of record in this case, favoring defendant's continuation in the program for many of the same reasons. Finally, defendant himself requested that he be continued in the drug abuse program, stating also that he was no longer on drugs and that he was employed in the construction industry.

Prior to passing sentence, the trial court commented that it could not, in good conscience, place defendant on probation in light of the "senseless" offense committed and in light of the court's uncertainty as to what would have happened if Miss Vuille's apartment door had been open at the time defendant was attempting to open doors in the building. The court thereupon imposed a period of incarceration, commenting that the penitentiary system had programs for narcotics addicts, that defendant's release

would be in the hands of the parole authorities, and that if defendant did not refrain from using drugs he would be incarcerated for an extended period.

The two contentions raised by defendant relating to the allegations in the indictment and the proofs adduced at trial were not presented to the trial court by motion to quash or by post-trial motion; those contentions, however, deal with ownership of the premises burglarized and may be considered together. He argues that the indictment alleges that he burglarized the premises of the Cosmopolitan National Bank and Trust Company, which is located on North Clark Street, whereas the proofs demonstrated that the building burglarized was located on North Dearborn Street; and that the indictment also alleges ownership of the burglarized premises by means of a land trust number, whereas such number was not proven at trial.

Defendant cites the case of People ex rel. Ledford v. Brantley (1970), 46 Ill. 2d 419, 263 N.E.2d 27, for the proposition that an indictment must identify ownership of the burglarized premises. However, the Ledford case has been expressly overruled in People v. Gregory (1974), 59 Ill. 2d 111, 319 N.E. 2d 483, holding that ownership, as such, does not have to be alleged in an indictment. Gregory holds that what is required of an indictment is that its allegations are set out with such specificity and particularity that the accused knows what he is charged with and is able to prepare a defense thereto, and that he is also protected from subsequent prosecution for the same offense.

The instant indictment charges defendant with the burglary of the building of the Cosmopolitan Bank as trustee under a land trust. The indictment is couched in the terms of the statute which defines burglary, Section 19-1 of the Criminal Code, with such specificity and particularity to enable defendant to prepare a defense thereto and also providing a bar to further prosecution for the same offense. Ownership of the premises burglarized

was proven in someone other than the defendant, through testimony from a party capable of proving such fact. Defendant cannot be heard to complain that either the indictment or the proofs as to ownership were so lacking as to subject him to double jeopardy for the same offense.

Defendant's contention that he was not proven guilty beyond a reasonable doubt of the offense of burglary is likewise without merit. He alludes to alleged discrepancies in the State's evidence and engages in inferences from the evidence which were obviously not entertained by the trier of fact. The foregoing summary of the evidence demonstrates sufficient evidence adduced by the State from which the trier of fact could have found that defendant was the person who had been ringing doorbells and trying apartment doors in the 1421 Dearborn building and who was immediately thereafter found in the basement of that building in possession of a screwdriver. The factual discrepancies alluded to by defendant were resolved by the trier of fact in favor of the State's position, and this court will not, under the circumstances, substitute its judgment as to such matters. People v. Webb (1st Dist. 1971), 3 Ill. App. 3d 1012, 279 N.E.2d 757.

Defendant takes the further position that the evidence demonstrates that he is entitled to probation and treatment under the provisions of the Illinois Dangerous Drug Abuse Act, and that the trial court abused its discretion in denying his request for relief in that regard. Ill. Rev. Stat. 1973, ch. 91-1/2, pars. 120.1 et seq.

Admission to treatment in the drug abuse program rests within the sound discretion of the trial court; it is not available to a defendant simply at his option. (See c.g., People v. Clinkscale (1st Dist. 1973), 14 Ill. App. 3d 226, 302 N.E.2d 181; People v. Robinson (5th Dist. 1973), 12 Ill. App. 3d 200, 301 N.E.2d 621.) As detailed above, the record discloses that the trial court heard extensive evidence concerning defendant's rehabilitative potential, the attitude of the drug abuse program representative relative thereto, and matters in aggravation of the offense.

The question of whether defendant should be admitted to the drug abuse program rested in the sound discretion of the trial court and, under the instant circumstances, we cannot say that the court abused its discretion in denying the relief requested in that regard.

A matter which has not been raised by the parties to this appeal relates to the recitation in the common law record that defendant was found guilty of both the offense of burglary and the offense of possession of burglary tools, the latter being the second count of the instant two-count Indictment Number 71-2631 returned against him. (Ill. Rev. Stat. 1969, ch. 38, pars. 19-1, 19-2.) The report of proceedings, on the other hand, demonstrates that the trial court entered a general finding of guilty; the trial court's disposition as to the count for possession of burglary tools is therefore equivocal. Nevertheless, the charge of possession of burglary tools, under the circumstances of this case, was the lesser offense included in the burglary charge of the indictment; defendant therefore could not have been found guilty of both offenses, under the supreme court ruling in People v. Lilly (1974), 56 Ill. 2d 493, 309 N.E. 2d 1. The common law record must therefore be corrected pursuant to our authority under Supreme Court Rule 651. Ill. Rev. Stat. 1973, ch. 110A, par. 615.

For the foregoing reasons, the common law record is corrected to reflect that defendant was found guilty solely of the offense of burglary as charged in count one of Indictment Number 71-2631, and the judgment and sentence, as corrected, are affirmed.

Judgment affirmed,
as corrected.

60521

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
 vs.)
)
 HARRY TEMEN,) HONORABLE JAMES C. MURRAY,
) Presiding.
 Defendant-Appellant.)

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.

PER CURIAM:

Harry Temen, defendant, was found guilty after a bench trial of the crime of burglary (Ill. Rev. Stat. 1973, ch. 38, par. 19-1). He was sentenced to a term of two to six years. Defendant appeals arguing (1) that the pretrial identification procedures used were improper, should have been suppressed and denied him a fair trial, (2) that the evidence was insufficient to establish his guilt beyond a reasonable doubt, (3) that the trial judge applied an erroneous standard in finding him guilty, and (4) that the indictment charging him with burglary was fatally defective.

At the hearing on the motion to suppress and at trial, the following evidence was adduced: Richard Plambeck, the custodian for the Irving Park Lutheran Church located at 3938 West Belle Plaine, Chicago, Illinois, testified that on January 21, 1973, at approximately midnight, he heard the church alarm go off. He left his home located a short distance away and approached the side door of the church. As the side door to the church was opened he came face to face with a man whom he later identified as the defendant. Plambeck testified that he had a flashlight in his hand which he shined on the defendant's face. The area was also lit with a one-hundred watt light bulb on each side of the door. Plambeck testified that after viewing defendant's face for approximately 30 seconds, the defendant swung



a metal bar at him. Plambeck ducked to avoid being hit by the bar and the defendant pulled the door closed and fled back into the church. Shortly thereafter, the police arrived at the scene. After entering the church with the policeman, Plambeck found a door pried open, several file cabinets forced open and papers strewn about the floor. At that time Mr. Plambeck described the man whom he had seen in the doorway of the church as a male white, approximately 40 years old, 220 lbs., 5'10" to 5'11" tall.

The following day, Plambeck viewed approximately 30 photographs shown to him by the police. At that time he identified the defendant as the man whom he had seen in the doorway of the church. On February 28, 1973, Plambeck attended a preliminary hearing in the defendant's case. At that time he again identified the defendant as the man he had seen in the doorway of the church.

Ross Henry Larson, the minister for the Irving Park Lutheran Church, testified that he did not give the defendant permission to enter or remain in the church on January 21, 1973. Reverend Larson testified that after hearing the alarm he telephoned the police who arrived a short time later. He stated that the Irving Park Lutheran Church is a not for profit organization licensed in the State of Illinois.

Chicago Police Officer Raymond Ahrens testified that in the late evening hours of January 21, 1973, he responded to a call and proceeded to the Irving Park Lutheran Church. He and other officers searched the church but did not find anyone inside.

Chicago Police Investigator George Wendell testified: on January 22, 1973, he was assigned the investigation of the burglary of the Irving Park Lutheran Church. On that date Mr. Plambeck was shown approximately 30 photographs and identified the photograph of the defendant as the man whom he had seen come out of the church. A warrant was obtained for defendant's arrest. Defendant was placed under arrest at 344 Grove Street, Wood Dale,

Illinois.

Defendant's first contention is that the pretrial identification procedures were unnecessarily suggestive, should have been suppressed and denied him a fair trial. Here, Mr. Plambeck testified that during the incident he viewed the defendant's face for approximately 30 seconds when he opened the side door to the church. At that time Plambeck had a flashlight which he was shining in the defendant's face. In addition, there was a one-hundred watt light bulb on each side of the door where he viewed the defendant. The day after the incident Plambeck was shown approximately 30 photographs by the police. He identified a photograph of the defendant as the man he had seen in the doorway to the church the previous evening. There is nothing in the record which would indicate that the police in any way pointed Plambeck's attention to the photograph of the defendant or in any other way made his identification suggestive. The photographic identification of the defendant was proper. Simmons v. United States, 390 U.S. 377; People v. Savaiano, 10 Ill.App.3d 666, 294 N.E.2d 740.

The next time Mr. Plambeck saw the defendant personally was when he attended a preliminary hearing and identified defendant after defendant's case was called. Defendant argues that this amounted to a show-up, was unnecessarily suggestive and denied him a fair trial. However, defendant ignores the fact that this occurred only after Mr. Plambeck had first viewed the defendant during the crime and then identified defendant's photograph from approximately 30 photographs which he viewed. In light of these factors, we do not believe that the defendant was denied a fair trial. During the incident in question, Mr. Plambeck had a sufficient period of time to view the defendant under adequate lighting so as to fix his identity. Plambeck's prior observations of the defendant were more than sufficient to serve as an

independent origin to the in-court identification which was properly admitted into evidence. People v. Tuttle, 3 Ill.App.3d 326, 278 N.E.2d 458.

Defendant's next contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. The rule is well established and has often been stated that in a bench trial the credibility of witnesses is for the trier of fact to determine and his determination will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. (People v. Wright, 3 Ill.App.3d 262, 278 N.E.2d 175; People v. Daugherty, 1 Ill.App.3d 290, 274 N.E.2d 109.) An identification of a defendant by one witness if positive and credible is sufficient to sustain a conviction. People v. Bennett, 9 Ill. App.3d 1021, 293 N.E.2d 687.

In the case at bar, the testimony of Plambeck was positive and credible. He testified that after hearing the church alarm go off he proceeded to the church to investigate. As the side door opened he observed the defendant standing in the doorway. He was able to view the defendant's face from close proximity for approximately 30 seconds. During this time he had a flashlight in his hand which he was shining on defendant's face. In addition, the area was lit by a one-hundred watt light bulb on each side of the door. The defendant swung a steel bar at Mr. Plambeck, pulled the door closed, and fled back into the church. The police arrived a short time later and searched the premises, but failed to find anyone. The office area of the church was in a state of disarray and the doors of several lockers had been pried open. Papers were strewn all over the floor. While defendant argues that the description Mr. Plambeck gave to the police did not precisely match that of the defendant, this at best raises a question of credibility which is for the

trier of fact to determine. Precise accuracy in describing defendant's characteristics is unnecessary where the identification is positive. (People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694.) After hearing all of the testimony adduced at trial, the trial judge found that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete review of the entire record, we can not say that his determination was erroneous.

Defendant's next contention is that the trial judge, in finding him guilty, applied an erroneous standard. The basis of defendant's argument is certain statements made by the trial judge in denying defendant's motion for a directed verdict at the end of the State's case. The trial judge stated that on the issue of identification he had ruled in the favor of the State at the pretrial motion to suppress. The trial judge then reiterated the pertinent parts of Mr. Plambeck's testimony and asked counsel to address himself to that issue. Defendant now argues that the trial judge's comments indicated that the judge felt bound by his ruling on the motion to suppress the identification testimony and that the court felt that determination was sufficient to establish defendant's guilt beyond a reasonable doubt. We can not agree with defendant's argument. The trial judge's comments were made during the arguments on defense counsel's motion for a directed verdict and indicated only that the court had previously ruled in favor of the State on a pretrial motion to suppress the identification. The trial judge's comments did not, in any way, indicate that he was applying any standard other than reasonable doubt in finding the defendant guilty.

Defendant's final contention is that the indictment charging him with burglary was fatally defective in that it failed to allege ownership of the building in question. The Illinois Supreme Court has ruled that it is not necessary for an indictment charging

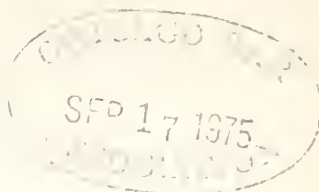
burglary to allege ownership of the property involved. People v. Gregory, 59 Ill.2d 111, 319 N.E.2d 483.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

291A 584



No. 60551

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
HAROLD BEAN,	)	SIDNEY A. JONES, JR.,
Petitioner-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos and Leighton, JJ.

PER CURIAM

Harold Bean (hereafter petitioner) was convicted following a bench trial of the offense of attempt. (Ill. Rev. Stat. 1965, ch. 38, par. 8-4.) On direct appeal, this court affirmed petitioner's conviction. (People v. Bean (1970), 121 Ill. App. 2d 290, 257 N.E.2d 558, cert. den., 402 U.S. 1009.) On June 19, 1973, petitioner's retained counsel filed a petition under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.) contending the original indictment was void. At a hearing on August 27, 1973, the court dismissed the petition for failure to state a substantial constitutional question, rejecting the petitioner's argument that the indictment did not allege with sufficient specificity an "act which constitutes a substantial step toward the commission" of the offense of burglary. (Ill. Rev. Stat. 1965, ch. 38, par. 8-4.) The only issue on appeal is whether the indictment properly alleged an overt act constituting a substantial step toward the commission of the offense of burglary.

The indictment alleged that the defendant, along with a named co-defendant:

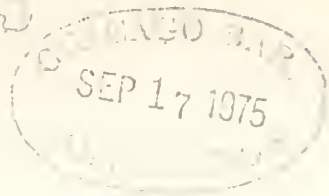
"[C]ommitted the offense of attempt, in that they, with the intent to commit the offense of burglary, without authority knowingly attempted to enter into a building, to wit: factory and office of Stitt Reed, Inc., a corporation, with the intent to commit a theft, in violation of Chapter 38, Section 8-4 of the Illinois Revised Statutes 1965, contrary to the State, and against the peace and dignity of the People of the State of Illinois."

In People v. Richardson (1965), 32 Ill. 2d 497, 502, 207 N.E.2d 453, the court stated that all "that need be shown in a charge of attempt is the intent to commit a specific offense" and "an overt act constituting a substantial step toward commission of that offense," and held that the phrase "attempted to obtain unauthorized control over \$3 in United States currency, the property of said John Overbea" was sufficient to charge an overt act constituting a substantial step toward commission of theft. More recently, in People v. Woodward (1973), 55 Ill. 2d 134, 302 N.E.2d 62, the court cited Richardson with approval and held a substantial step toward the commission of burglary was alleged with sufficient particularity in an indictment charging the defendant "did use a tire tool in attempting to open the front door of" a particular building. In People v. Drink (1967), 85 Ill. App. 2d 202, 229 N.E.2d 409, the court held the phrase "attempted to kill Gerald M. Lewandowski" sufficiently charged a substantial step toward the offense of murder and stated that the indictment "need not set out the manner of the assault with any degree of particularity." (85 Ill. App. 2d 202, 204.) In the case at bar, the indictment did allege an overt act constituting a substantial step toward the commission of a burglary when it charged that the defendant "without authority knowingly attempted to enter" into a particularly described building. This was sufficient to charge the offense of attempt. Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

(Publish abstract only.)

60546



PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
v.)
VERNON LEWIS,)
Petitioner-Appellant.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
ROBERT J. COLLINS,
Presiding.

PER CURIAM:

Before McGLOON, P.J., DEMPSEY, J., and MEJDA, J.

Vernon Lewis, petitioner, appeals from the dismissal of his post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.) without an evidentiary hearing.

Petitioner was charged by indictment with two counts of armed robbery. On March 1, 1973, he entered a negotiated plea of guilty and was sentenced to concurrent terms of four years to four years and one day on each charge. Petitioner did not appeal that conviction. On June 11, 1973, he filed a pro se post-conviction petition. Counsel was appointed to represent him and an amended post-conviction petition was filed. Upon motion of the State, the amended post-conviction petition was dismissed without an evidentiary hearing.

Petitioner's only contention on appeal is that he was entitled to an evidentiary hearing on the allegation in his post-conviction petition that his plea of guilty was involuntarily entered since it was based upon the belief that he was receiving the minimum possible sentence when he could have been sentenced to a term of periodic imprisonment under the Unified Code of Corrections.

In Boykin v. Alabama (1969), 395 U.S. 238, the United States Supreme Court held that it is a violation of due process to accept



a guilty plea in state criminal court proceedings without an affirmative showing on the record that the defendant voluntarily and understandingly entered his plea of guilty. Supreme Court Rule 402 was passed to insure compliance with the Boykin requirements and give visibility to plea agreements. (Committee Comments, 50 Ill. 2d R. 402.)

The basis of petitioner's present argument is that his plea of guilty was involuntary because the trial judge did not advise him and he was unaware that a sentence of periodic imprisonment was possible under the statute. Here petitioner was charged with two counts of armed robbery. The hearing in aggravation and mitigation demonstrated that petitioner had a prior record consisting of several convictions, including one penitentiary sentence. Prior to entering his plea of guilty, he entered into plea negotiations obviously with the intent of avoiding a higher sentence. He entered his plea of guilty only after the pre-trial conference and knowing the exact sentence which would be imposed. Prior to accepting the plea of guilty the trial judge carefully admonished petitioner of each of his constitutional rights as set forth in Supreme Court Rule 402, including the fact that he could be sentenced to an indeterminate term with a minimum of four years, and that any sentence would include a mandatory parole period of five years. At the time his plea of guilty was entered petitioner made a specific election to be sentenced under the Unified Code of Corrections. He did receive the minimum possible penitentiary sentence provided under the Code.

There is nothing in Boykin or Supreme Court Rule 402 which requires that a defendant be advised of the possible dispositions of his case by way of periodic imprisonment, probation or conditional discharge prior to entering a plea of guilty. (People v. Krantz



(1974), 58 Ill. 2d 187, 317 N.E. 2d 559.) In addition, considering petitioner's prior record and the crimes of which he was convicted, it is extremely improbable that he would have even been considered for a sentence of periodic imprisonment. After a complete review of the entire record we conclude that petitioner knowingly and voluntarily entered his negotiated plea of guilty after proper admonitions by the trial court. His post-conviction petition was insufficient to require an evidentiary hearing and was properly dismissed by the trial court.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



No. 60582

2D
291A, 506

CHICAGO ILL
SEP 17 1975
103061116

PEOPLE OF THE STATE OF ILLINOIS,)
)
Respondent-Appellee,) APPEAL FROM THE CIRCUIT
)
v.) COURT OF COOK COUNTY.
)
BEN EARL BROWDER,) HONORABLE
) PHILIP ROMITI,
Petitioner-Appellant.) PRESIDING.

Before McGLOON, P.J., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Ben Earl Browder, petitioner, appeals the denial of his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1973, ch.38, par.122-1 et seq.) without an evidentiary hearing.

Petitioner was originally charged by indictment with the crimes of armed robbery and rape. After a jury trial he was found guilty of armed robbery and sentenced to a term of four to fifteen years. Petitioner appealed to this court which on July 2, 1973, affirmed the judgment of conviction. (People v. Browder (1973), 13 Ill.App. 3d 198, 300 N.E.2d 511. The Illinois Supreme Court denied leave to appeal.) On August 16, 1973, petitioner filed a post-conviction petition. Upon motion of the State, on December 13, 1973, petitioner's post-conviction petition was denied without an evidentiary hearing.

Petitioner appeals arguing that he was entitled to an evidentiary hearing on the allegations in his post-conviction petition: (1) he was denied the effective assistance of counsel in that trial counsel failed to secure four alibi witnesses and failed to move to suppress the fruits of petitioner's apparently unlawful arrest and (2) he was improperly denied his constitutional right to counsel at his lineup identification.

Petitioner's first contention on appeal is that he was entitled to an evidentiary hearing on the allegation in his post-conviction petition that trial counsel was incompetent in that he failed to secure four alibi witnesses. In order to show a deprivation of a constitutional right to counsel, petitioner must clearly establish



actual incompetency of counsel as reflected by the manner of carrying out his duties as the trial attorney and substantial prejudice resulting therefrom without which the outcome would probably have been different. People v. Lynch (1973), 11 Ill. App.3d 479, 297 N.E.2d 382.

In the case at bar, petitioner, in an affidavit attached to his post-conviction petition, stated that prior to trial he had informed defense counsel of the existence of four alibi witnesses, two of whom were defendant's mother and brother, but that defense counsel informed him that the presence of the alibi witnesses would not be necessary. As pointed out in this court's affirmance of defendant's conviction "***the proof left no doubt whatsoever of his (defendant's) guilt." Indeed, a review of the evidence adduced at trial demonstrates that the State's case was overwhelming. The evidence adduced at trial revealed that the crime occurred at approximately 5:45 p.m. Defendant's testimony at trial established that his alibi witnesses would only have testified to his presence from 5:30 p.m. and thereafter. Petitioner's affidavit stated that although counsel was aware of the four alleged alibi witnesses, he chose not to call them at trial. Under these circumstances, we conclude that the failure to call the alibi witnesses was a matter of trial tactics and does not demonstrate incompetency of counsel. (People v. Talasch (1974), 20 Ill.App.3d 794, 314 N.E.2d 510.) As pointed out in a specially concurring opinion in affirming petitioner's conviction "This record shows that defendant was quite ably represented in the trial court." The record in its entirety establishes that trial counsel at all times properly represented the petitioner considering the fact that he was faced with an extremely strong State's case. We believe that defendant received adequate and competent representation at trial.

Petitioner's next contention is that he was entitled to an evidentiary hearing on the allegation that his trial counsel was incompetent in that counsel failed to move to suppress the fruits of petitioner's unlawful arrest. In his post-conviction petition



filed in the trial court, petitioner argued that his arrest was illegal and that all things flowing therefrom should have been suppressed as the fruit of the poisonous tree. However, petitioner did not allege that trial counsel was incompetent for failing to raise this issue. The rule is well established that where an argument is not raised in the post-conviction petition filed in the trial court, it may not be raised for the first time on appeal. People v. Turner (1970), 47 Ill.2d 7, 264 N.E.2d 145; People v. Eldredge (1969), 41 Ill.2d 520, 244 N.E.2d 151.

In addition, petitioner in his direct appeal argued that his arrest was illegal and that his identification and admissions following such arrest should have been suppressed as the fruit of the poisonous tree. The rule is well established that where defendant has appealed his conviction, any allegation which has been considered and rejected by the court in that appeal, cannot be reconsidered in post-conviction proceedings under the doctrine of res judicata. (People v. Walker (1972), 6 Ill.App.3d 909, 286 N.E.2d 812; People v. Westbrook (1972), 5 Ill.App.3d 970, 284 N.E.2d 695.) Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further reconsideration of that issue in post-conviction proceedings by the doctrine of res judicata.

Petitioner's final contention is that he was entitled to post-conviction relief on the allegation in his petition that he was denied his constitutional right to counsel at his lineup identification. In Kirby v. Illinois (1972), 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877, the Supreme Court held that the right to counsel applies only at or after the time that adversary judicial proceedings have been initiated against him.

In People v. Johnson (1973), 55 Ill.2d 62, 302 N.E.2d 20, the defendant was found guilty after a jury trial of the crimes of murder and armed robbery. The facts adduced at trial showed that defendant was arrested at his home without a warrant and was taken



to the police station where a lineup was conducted. On appeal defendant argued that he had a constitutional right to counsel at the lineup. The Supreme Court rejected defendant's contention holding that adversary judicial proceedings had not yet been initiated at the time of defendant's lineup. See also People v. Reese (1973), 54 Ill.2d 51, 294 N.E.2d 288.

Similarly, in the case at bar, defendant was placed under arrest at his home without a warrant and taken to the police station where a lineup was conducted. At the time of the lineup adversary judicial proceedings had not yet been initiated and the absence of counsel did not deny defendant any of his constitutional rights.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



61159

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
v.)
ORA CHARLES DUNCAN,)
Petitioner-Appellant.)

28 JAN 1976
SEP 17 1975
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
L. SHELDON BROWN,
Presiding.

PER CURIAM:

Before McGLOON, PJ., DEMPSEY AND MEJDA, JJ.

Ora Charles Duncan, petitioner, appeals from the dismissal of his pro se post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.). The sole issue on appeal is whether the trial court properly dismissed the petition without an evidentiary hearing.

On January 25, 1968, petitioner pleaded guilty to the offense of murder, and was sentenced to not less than 15 nor more than 25 years in the penitentiary. No direct appeal was taken from this judgment. On April 15, 1971, he filed a pro se petition for post-conviction relief. The Public Defender filed his appearance on May 26, 1971, but did not file an amended petition. The State filed a motion to dismiss the petition. The motion was allowed without an evidentiary hearing, and notice of appeal was filed on April 4, 1972.

The Public Defender was appointed to represent petitioner. He has filed a motion to withdraw, under Anders v. California (1967), 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, supported by a brief, on the ground that there are no meritorious issues. Copies of the motion and brief were mailed to defendant on February 25, 1975, and



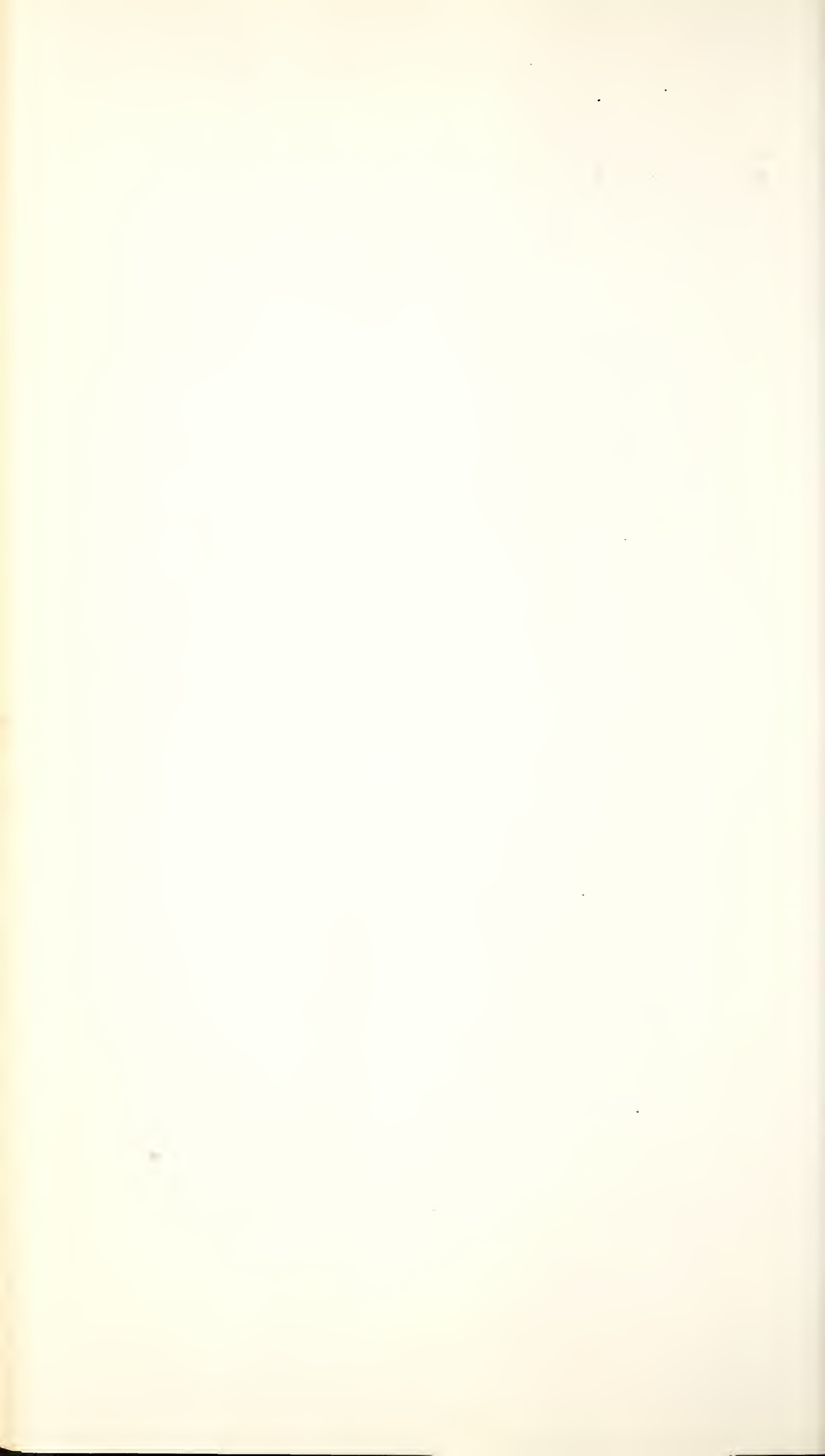
he was informed that he had until May 9, 1975 to file any additional points he might choose in support of his appeal. He has not responded.

In his pro se petition filed April 15, 1971 petitioner alleged that he was not provided with competent counsel because appointed private counsel "failed and omitted to take fundamental steps to guarantee him due process of law" in that (a) counsel failed to investigate the facts which would prove that he had not committed murder; (b) because of counsel's failure to make an independent investigation of the facts he was unfamiliar with the evidence which could have been presented on behalf of petitioner; (c) counsel "coerced [petitioner] through threats of greater punishment [the electric chair]", because he informed petitioner of "the impossibility of acquittal," and thereby induced petitioner "into pleading guilty to an offense of which he, in fact, was not guilty"; and (d) counsel "failed and omitted to take other steps to protect the rights of Defendant-Petitioner." Petitioner further alleged that he "would not have plead [sic] guilty to murder, an offense of which he was not guilty, had it not been for a substantial denial of due process of law and violation of his constitutional rights."

Attached to the motion to dismiss is the Report of Proceedings of petitioner's change of plea. On January 25, 1968, he changed his plea from not guilty to guilty. Before the trial court accepted the plea the following discussion took place between the trial court and petitioner:

THE COURT: You are withdrawing a plea of not guilty and entering a plea of guilty.

MR. SLAGER [Private appointed counsel]: Yes, Judge.



THE COURT: All right, now, Mr. Duncan, I want to advise you that you have a right to trial by jury. Do you know what a jury trial is?

DEFENDANT: Yes, sir.

THE COURT: You have that right of trial by jury. Now, when you withdraw your plea of not guilty and enter a plea of guilty, you automatically [sic] waive that right to a jury trial. You know this?

DEFENDANT: Yes.

THE COURT: And this is what you want to do?

DEFENDANT: Right.

THE COURT: I take it you have conferred with your counsel about this, and after being duly advised by your counsel, this is what you have decided you want to do freely and voluntarily?

DEFENDANT: Yes, sir.

THE COURT: Now, I assume that your counsel here has also advised you regarding what sentence I could give you on a plea of guilty. He has done that, has he?

DEFENDANT: Yes.

THE COURT: I am going to advise you again that on a plea of guilty, I can sentence you to the penitentiary for a period of fourteen years and any number of years beyond that, and it is also possible on your plea of guilty to this charge to sentence you to death by the electric chair. I want you to know this. It is my duty to advise you that this could happen on a plea of guilty to murder, and I assume your counsel has also told you this, has he?

DEFENDANT: Yes.

THE COURT: Now, knowing this, you still want to plead guilty, is that right?

DEFENDANT: Yes.

THE COURT: And you are also satisfied with the advice of your lawyer on this, satisfied with his services?

DEFENDANT: Yes.

Before entering judgment on the plea of guilty the trial court again questioned petitioner about the voluntariness of his plea of guilty:

THE COURT: All right, Mr. Duncan, before I enter a judgment on this plea, I just want to be certain again, I am going to ask you again, this is what you want to do, you want to plead guilty?



DEFENDANT: Yes.

THE COURT: You are doing it voluntarily?

DEFENDANT: Yes.

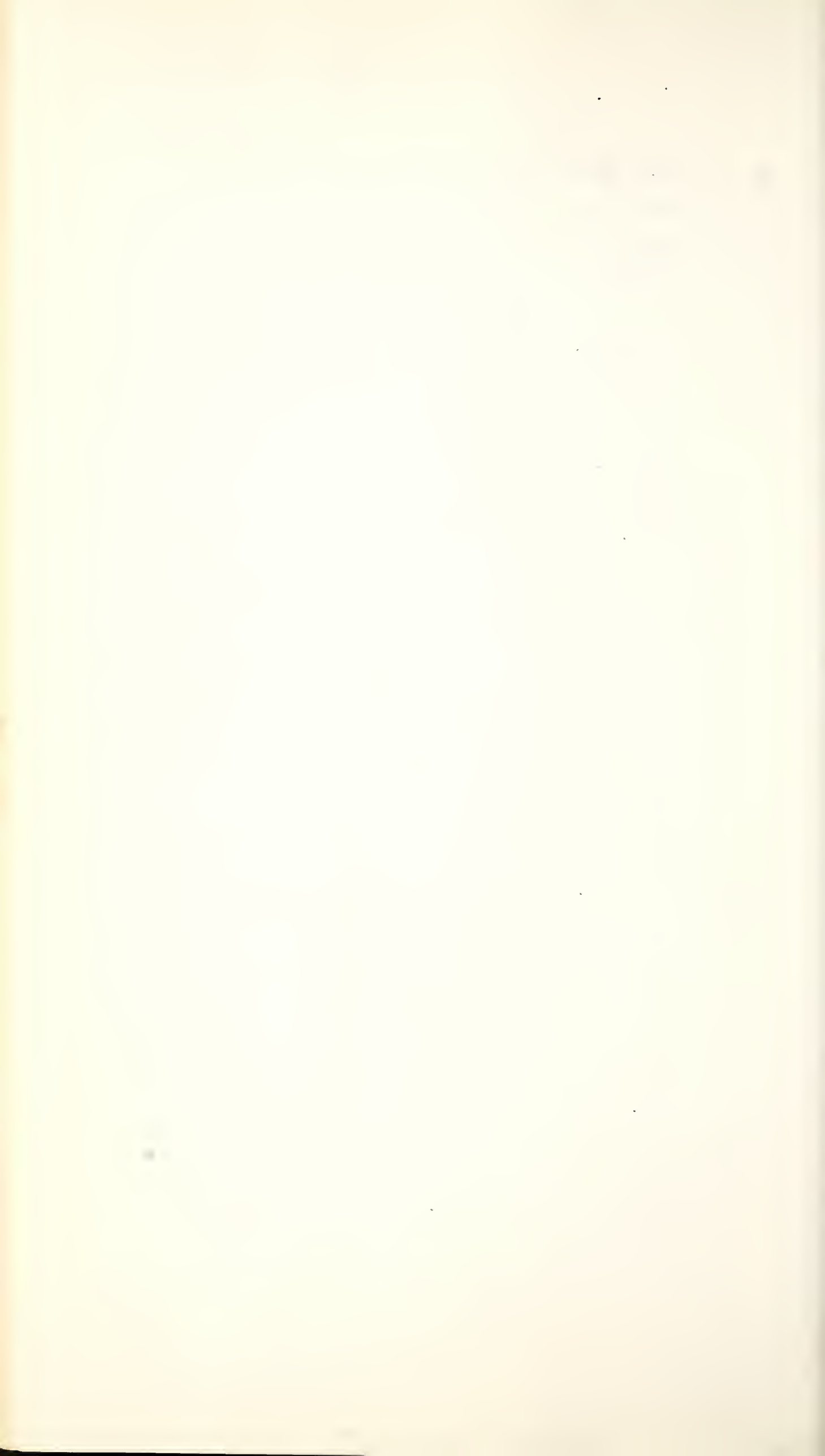
THE COURT: And of your own free will, and after advice from counsel, and you deem his services valuable to you?

DEFENDANT: That's true.

THE COURT: All right, there will be a judgment upon the plea of guilty.

The trial court then heard a stipulation as to the facts which disclosed that on August 7, 1966, the petitioner and a man by the name of Sparks were with the deceased, Daryl Williams, in the latter's apartment at 4836 North Magnolia Avenue, Chicago; that Sparks left to get something to eat, and upon his return Sparks noticed Williams lying dead on the living room floor; that he asked petitioner what happened and petitioner replied, "I strangled him." Petitioner admitted placing the body in the trunk of Williams' car and driving with Sparks to an abandoned stone quarry in VanWirth [sic], Ohio, where they disposed of the body.

The Public Defender states that a possible ground for appeal might be that petitioner was not adequately admonished at the time he pleaded guilty. The plea was entered on January 25, 1968, before Supreme Court Rule 402 became effective on September 1, 1970 (Ill. Rev. Stat. 1971, ch. 110A, par. 402). Therefore, former Rule 401(b) governed the plea of guilty in the instant case (Ill. Rev. Stat. 1969, ch. 110A, par. 401(b)). Under the provisions of Rule 401(b), the petitioner was adequately admonished. (People v. Harris (1971), 50 Ill.2d 31,33, 276 N.E. 2d 327.) The trial court advised petitioner of his right to a jury trial and ascertained that petitioner desired to waive that right; that petitioner had conferred with his counsel regarding the change of plea and it was petitioner's free and voluntary decision; and that petitioner was satisfied with the advice of his lawyer and satisfied with his services. The trial court admonished petitioner as to the minimum and maximum penalties; and that



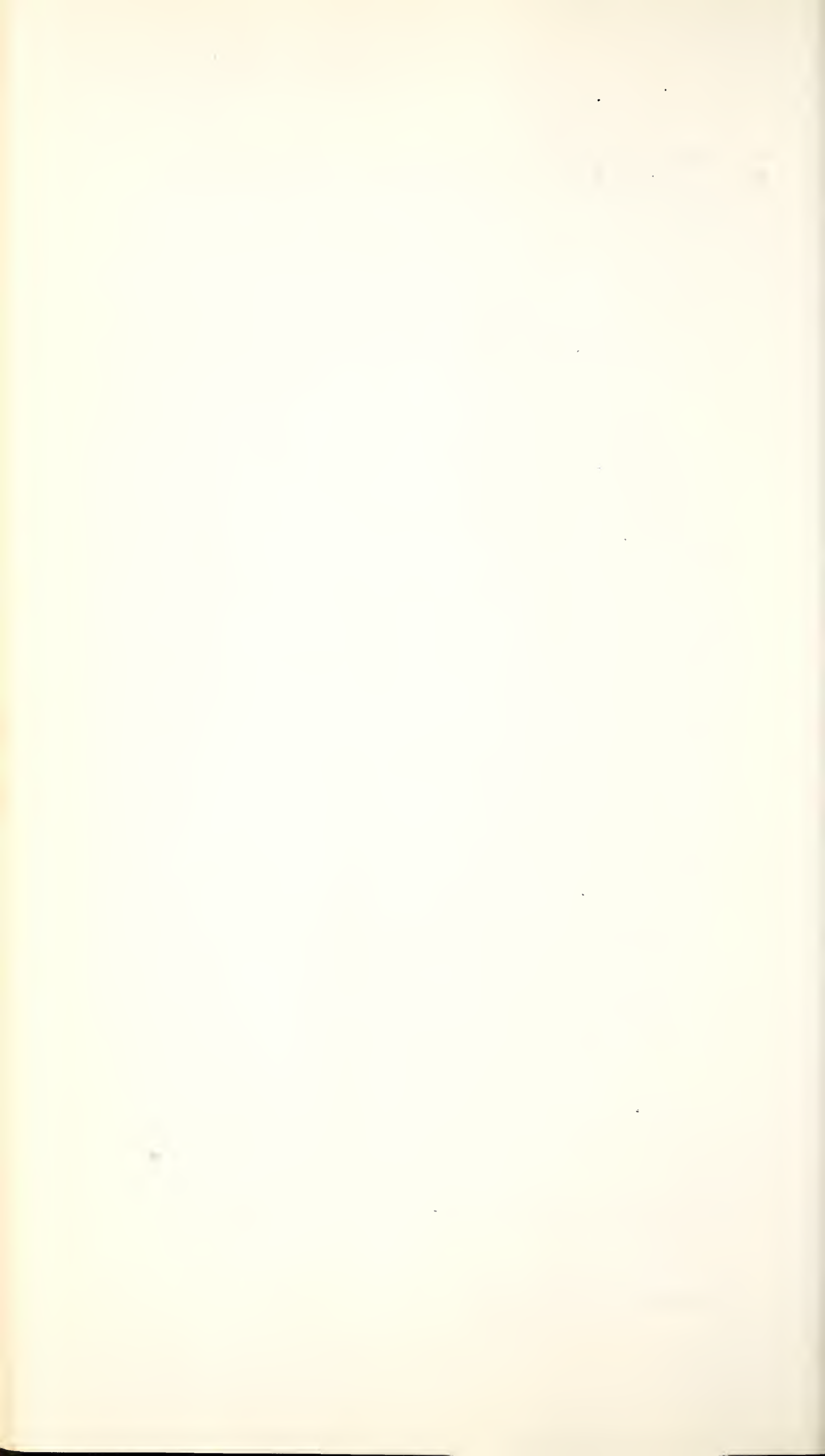
on his plea of guilty to the charge of murder he could be sentenced to death in the electric chair. The record is sufficient to show that petitioner knowingly and voluntarily pleaded guilty to the offense of murder. People v. Barber (1972), 51 Ill.2d 268, 270, 281 N.E. 2d 676; People v. Arndt (1971), 49 Ill.2d 530, 276 N.E. 2d 306; People v. Payne (1973), 16 Ill.App. 3d 83,88, 305 N.E. 2d 700.

The Public Defender also states that another possible ground for appeal might be petitioner's claim that he was coerced into pleading guilty by the threat of his appointed counsel "of greater punishment [the electric chair]." In People v. Scott (1971), 49 Ill.2d 231,233, 274 N.E. 2d 39, petitioner filed his verified pro se petition, alleging that he pleaded guilty "because the states attorney told the petitioner that he had talked to the co-defendants and, that pursuant to that conversation, had learned that the co-defendants were going to testify against the petitioner and that if the petitioner did not plead guilty he would ask that the death penalty be inflicted." The court held that such an allegation was not sufficient "to invalidate the defendant's otherwise knowing and intelligent plea of guilty."

In People v. Payne (1973), 16 Ill.App. 3d 83,88, 305 N.E.2d 700, the court held that "It does not amount to coercion for defense counsel to inform his client as to the weakness of his case and the possibility that a death sentence could be imposed if he chose to go to trial."

In the case before us there was no showing that sufficient facts or evidence existed to amend the pro se petition; therefore, counsel's failure to amend the petition did not result in inadequate representation. People v. Bowman (1973), 55 Ill.2d 138, 302 N.E. 2d 318.

Another possible ground for appeal might be petitioner's claim that appointed counsel failed to investigate the facts which would



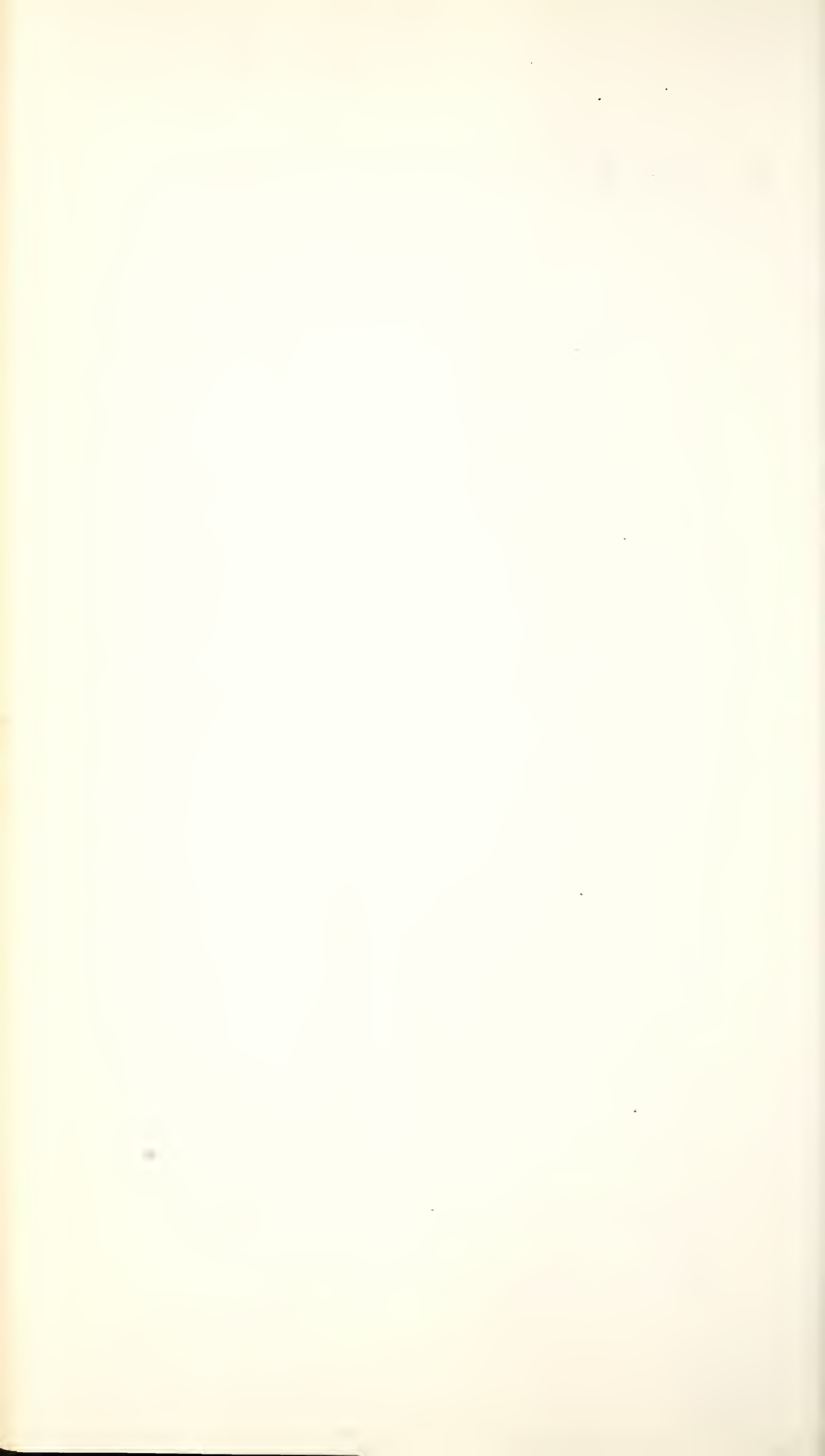
prove that he had not committed murder. Petitioner does not allege what particular facts counsel failed to investigate. The record discloses that in the stipulation of facts, in reply to the question of how Williams was killed, he said, "I strangled him." Also, at the change of plea hearing, petitioner stated that he was satisfied with the advice of his lawyer and with his lawyer's services. Further, at the hearing on the motion to dismiss, counsel stated that he had talked to petitioner and had attempted to investigate the leads given him, but that they were fruitless and did not demonstrate petitioner's innocence. Petitioner's possible argument of incompetency pertains to the exercise of judgment and discretion, and it is well settled that review of appointed counsel's competency does not extend to those areas involving the exercise of judgment, discretion, or trial tactics. People v. Wesley (1964), 30 Ill.2d 131, 195 N.E. 2d 708.

It is apparent that after counsel reviewed the record and talked to petitioner, he rightfully determined that any attempt to amend the pro se petition would be useless. Counsel was not obligated to urge frivolous points which were contrary to the law and to the facts. People v. Barnes (1973), 14 Ill.App. 3d 989, 303 N.E. 2d 775; People v. Anthony (1972), 5 Ill.App. 3d 722, 284 N.E. 2d 46.

We have examined the record and brief and agree with the Public Defender's conclusion that the issues raised by petitioner are not meritorious. Further, our examination of the record discloses no additional possible grounds for an appeal which are also not frivolous.

For the foregoing reasons, the motion of the Public Defender to withdraw as counsel on appeal is allowed, and the judgment of the circuit court dismissing the petition is affirmed.

Motion allowed;
judgment affirmed.



201A 309 3D

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 CHESTER HOLIDAY,)
)
 Defendant-Appellant.)

APPEAL FROM SEP 17 1975
 CIRCUIT COURT,
 COOK COUNTY, ILLINOIS
 HONORABLE
 RICHARD J. FITZGERALD,
 PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

This is an appeal from an order dismissing a post-conviction petition filed by the defendant, Chester Holiday. He acknowledged by affidavit that an appeal was pending from the judgment of conviction and sentence (People v. Holiday (1974), 21 Ill. App. 3d 796, 316 N.E. 2d 236), wherein the sole issue presented was whether or not the trial court erred in imposing multiple and concurrent sentences of three terms for voluntary manslaughter and one term for attempt to commit armed robbery. We affirmed one conviction for voluntary manslaughter and modified the sentence to not less than 6 1/3 years and not more than 19 years. The remaining convictions were vacated.

In this appeal from the post-conviction proceedings, the public defender of Cook County was appointed to represent the defendant. After examining the report of proceedings, counsel found no constitutional claims which could be raised under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, § 122-1 et seq.), and consequently did not file a supplemental petition. On the State's motion the defendant's pro se petition was dismissed. Thereupon, a notice of appeal was filed.

The public defender has filed a motion and brief, pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396, seeking leave to withdraw as counsel. Counsel represents that he has examined the record and determined that there are no issues upon which an appeal can be predicated. Copies of the motion and brief were mailed to defendant on



April 24, 1975. On May 8, 1975, defendant filed a document entitled, "Motion for Writ of Subpoena Duces Tecum to Issue," realleging many of the arguments that were considered by this court in the prior appeal.

We have made a careful review of the proceedings and documents in this case and agree with the public defender that there are no issues to be raised in this appeal that are not frivolous. Accordingly, the motion of the public defender for leave to withdraw as counsel is granted, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

BURMAN and ADESKO, JJ., concur.

Abstract only.



60592



PEOPLE OF THE STATE OF ILLINOIS ,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
CHARLES MAYS,	)	HONORABLE
	)	PHILIP ROMITI,
Petitioner-Appellant.	)	PRESIDING

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

Petitioner appeals from the dismissal without an evidentiary hearing of his pro se post-conviction petition, filed pursuant to the Illinois Post-Conviction Hearing Act. Ill.Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.

The sole issue on appeal is whether the petitioner was denied effective assistance of counsel for failure of his court-appointed counsel to file an amended petition.

On February 1, 1973, petitioner, who was represented by private counsel, pleaded guilty to two counts of attempt murder, and three counts of armed robbery. He was sentenced to the penitentiary for a term of 8 to 15 years on each count of each indictment, the sentences to run concurrently. No appeal was taken from these judgments.

On May 22, 1973, petitioner filed a pro se petition for post-conviction relief alleging, in substance, that: (1) his plea of guilty was entered in violation of due process of law because he was offered a choice of pleading guilty or being "railroaded into the penitentiary"; and that the trial judge took undue advantage of his ignorance of the law, thereby forcing him to plead guilty; (2) that he was denied his constitutional



right to a fair and impartial trial in that his plea of guilty was entered and accepted in violation of Supreme Court Rules 402, 411, 412, and 414, and the United States and Illinois Constitutions; (3) that he was denied his constitutional right to a fair and impartial trial and to the presumption of innocence because "the court failed to establish Corpus Delicti" in violation of the Illinois Supreme Court Rules; and (4) that he was denied his constitutional right to a fair and impartial trial because the sentences imposed were illegal since the minimum term of the sentences exceeded one-third of the maximum sentences.

On June 12, 1973, the Public Defender was appointed to represent petitioner. On June 14, 1973, the People filed a motion to dismiss alleging that petitioner's allegations failed to raise any constitutional question within the provisions of the Post-Conviction Hearing Act; and that those allegations which might be construed as raising constitutional questions were bare allegations insufficient to require a hearing. Attached to the motion was the transcript of the hearing of petitioner's change of plea.

On August 21, 1973, the Assistant Public Defender appointed to represent petitioner filed a certificate in accordance with Illinois Supreme Court Rule 651(c). The certificate stated that counsel had consulted with petitioner by mail on numerous occasions and visited him personally in the penitentiary on July 30, 1973; that he had examined the records of the proceedings at trial, as contained in what petitioner represented to counsel to be a verbatim transcript of the original transcript; and that he "thoroughly studied petitioner's pro se petition which fully and adequately presents all possible claims subject to relief under the Illinois Post-Conviction Hearing Act."

A hearing was held on the pro se petition and the State's motion to dismiss on September 12, 1973, at which time the

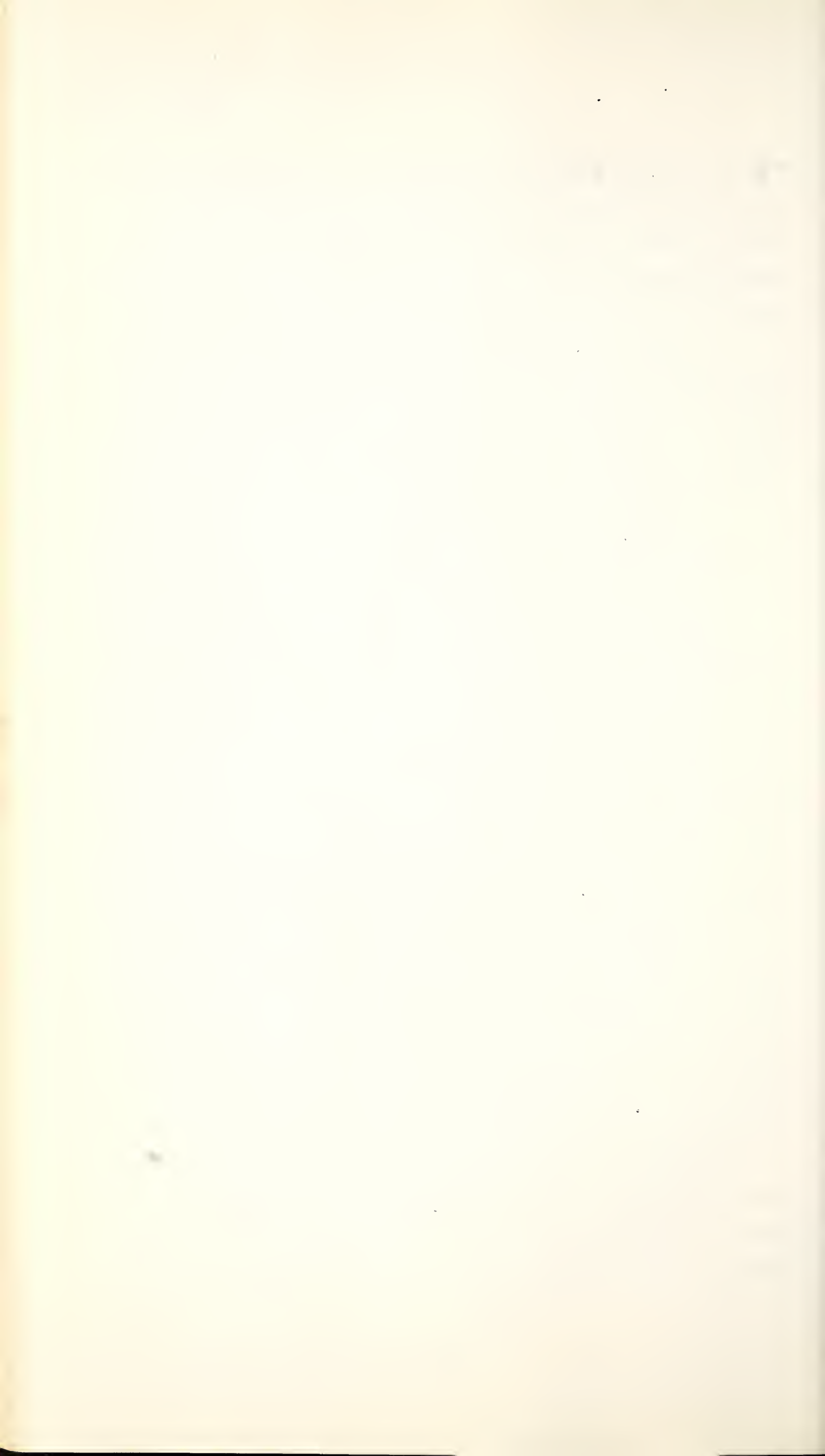


Assistant Public Defender stated that he had visited the petitioner; that the petition represented all of his claims; and that the claim "he was most concerned about was the one-third minimum-maximum statute." The trial court dismissed the pro se petition without an evidentiary hearing.

On appeal, petitioner argues that appointed counsel should have amended the pro se petition "in order to shape petitioner's complaints into the proper legal form" because the trial court dismissed the petition without an evidentiary hearing on the ground the allegations were "conclusory"; and that counsel's failure to amend said pro se petition "into the proper legal form" denied petitioner the effective assistance of counsel.

The law is clear that petitioner is not entitled to an evidentiary hearing as a matter of right, since the dismissal of a non-meritorious petition on motion is within the contemplation of the Post-Conviction Hearing Act and is necessary to the orderly and expeditious disposition of such petition. (People v. Collins, 39 Ill.2d 286, 235 N.E.2d 570; People v. Funches, 9 Ill. App.3d 372, 292 N.E.2d 187; People v. Payne, 16 Ill.App.3d 83, 305 N.E.2d 700.) To be entitled to relief under the Post-Conviction Hearing Act the petitioner must assert the substantial denial of a constitutional right. (People v. Newberry, 55 Ill.2d 74, 302 N.E.2d 34.) The burden is on the petitioner to clearly set forth in what respect his rights were violated. (People v. Dean, No. 60544, April 25, 1975.) In the absence of such a showing, the petition may be dismissed without a hearing. People v. Pierce, 48 Ill.2d 48, 268 N.E.2d 373.

Petitioner, relying upon the case of People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, contends that he was denied effective assistance of counsel during his post-conviction proceedings because counsel failed to amend the pro se petition.



Although Slaughter requires that appointed counsel consult with petitioner and examine the report of proceedings at trial [which was done in the case at bar], it does not require that in every case counsel must amend the pro se petition. In People v. Bowman, 55 Ill.2d 138, 302 N.E.2d 318, the court said (55 Ill.2d, p. 140):

"As is obvious, however, our referred-to statement in Slaughter has not and cannot be read to establish a requirement that counsel appointed to represent a petitioner in a post-conviction proceeding must in every case amend a pro se petition. In People v. Stovall, 47 Ill.2d 42, 46, we observed: 'Where there is not a showing that sufficient facts or evidence exist, inadequate representation certainly will not be found because of an attorney's failure to amend a petition or, when amended, failing to make the petition's allegations factually sufficient to require the granting of relief. Cf. People v. Smith, 40 Ill.2d 562; People v. Gendron, 41 Ill.2d 518.'"

Also see People v. Dodd, 58 Ill.2d 53, 317 N.E.2d 28.

Petitioner urges that counsel's failure to amend the pro se petition alone, requires reversal as a matter of law. However, there is no showing of the existence of facts which would warrant an amendment. (People v. Walker, 6 Ill.App.3d 909, 912, 286 N.E.2d 812.) In the case at bar, the pro se petition clearly and sufficiently sets forth the petitioner's contentions and, therefore, it was not error for counsel not to amend it.

When the record clearly contradicts the conclusionary allegations of a pro se post-conviction petition, as is true in this appeal, to prepare and file an amended petition by court-appointed counsel would be an exercise in futility.

Defendant further argues that counsel for the petitioner should have amended the allegation that "the trial court took undue advantage of petitioner's ignorance of the law, thereby forcing him to plead guilty." Petitioner, relying on People v. Washington, 38 Ill.2d 446, 232 N.E.2d 738, asserts that a coerced



or unintelligent plea of guilty deprives a defendant of due process of law; and that such an allegation is cognizable under the Post-Conviction Act. Petitioner contends the facts in the case at bar are similar to those of People v. Gonzales, 14 Ill. App.3d 535, 302 N.E.2d 718, where court-appointed counsel failed to amend a pro se petition which alleged petitioner was forced into pleading guilty due to the fear caused by the threats of the prosecutor. The court there held it was error for counsel not to amend the petition and "to state specifically petitioner's claims as to what threats were made, when they were made, to whom they were made, where they were made and who was present."

However, here it was not necessary for "appointed counsel to set forth with specificity the facts pertinent to petitioner's claim that Judge Romiti took advantage of him and forced him to plead guilty." Here the facts involved are all apparent from the record itself and, therefore, it was unnecessary for counsel to amend the allegation that the trial court forced petitioner to plead guilty. (People v. Harris, 50 Ill.2d 31, 276 N.E. 2d 327.) The record affirmatively shows that the trial court fully and adequately admonished petitioner on his plea of guilty in accordance with Supreme Court Rule 402. [It is apparent that Supreme Court Rules 411, 412 and 414, pertaining to discovery and disclosure, are not applicable to the facts in the case at bar.] Petitioner was charged in two separate indictments of two counts of attempt murder and three counts of armed robbery. On February 1, 1973, petitioner, who was represented by private counsel, withdrew his pleas of not guilty and pleaded guilty. Before accepting the guilty pleas, the trial court advised petitioner of his right to a jury trial; and that his plea of guilty would result in a waiver of that right, as well as a right to a bench trial. The trial court further asked petitioner whether



it was correct "that there was no force, no pressure nor coercion of any kind to force him to plead guilty," to which petitioner answered that the statement was correct. The court advised petitioner of the permissible range of punishment and petitioner stated that he understood the penalties which were provided by statute. Petitioner repeatedly stated that he understood the court's admonishments and persisted in his plea of guilty. The court then accepted the plea of guilty to each indictment, found petitioner guilty and after petitioner waived a pre-sentence report and after a hearing of aggravation and mitigation, petitioner was sentenced to concurrent terms of 8 to 15 years on each count of each indictment.

It is apparent that after counsel reviewed the record and talked to petitioner, any attempted amendment of the pro se petition would be a useless act. The record clearly shows there was no basis for the allegation that the trial court took undue advantage of the petitioner and forced him to plead guilty and, therefore, counsel was under no duty to amend the petition. Counsel was not obligated to urge frivolous points which were contrary to the law and contrary to the facts. People v. Barnes, 14 Ill.App.3d 989, 303 N.E.2d 775; People v. Anthony, 5 Ill.App.3d 722, 284 N.E.2d 46.

The record here shows that Supreme Court Rule 402 has been substantially complied with. (People v. Krantz, 58 Ill.2d 187, 317 N.E.2d 559.) Further, the claim that the trial court "railroaded [petitioner] into the penitentiary" is not substantiated by the record and did not raise an issue of constitutional proportions cognizable in the post-conviction hearing and, therefore, court-appointed counsel was not incompetent for his failure to amend the pro se petition.



Finally, it is noted the pro se petition alleged that the sentences imposed were illegal since the minimum terms exceeded one-third of the maximum sentences. At the hearing on petitioner's plea of guilty, his private counsel stated that he had explained to petitioner his right to make an election as to whether he should be sentenced under the law as it existed at the time of the commission of the offense or whether he should elect to be sentenced under the Unified Code of Corrections. The petitioner elected to be sentenced under the Unified Code of Corrections. The trial court then explained that under the old law a sentence for attempt murder was one to twenty while under the Unified Code of Corrections it was "four to intermediate" and that for armed robbery under the old law it was five to intermediate but under the Code it was four to intermediate. Although the point was alleged and argued in the trial court, it has not been argued on appeal and, therefore, is considered waived. (Ill.Rev.Stat. 1973, ch. 110A, Rule 341(e)(7); People v. Mackins, 17 Ill.App. 3d 24, 308 N.E.2d 92.) Further, the alleged excessiveness of a sentence is not cognizable in a post-conviction proceeding. (People v. Murry, 5 Ill.App.3d 64, 283 N.E.2d 98; People v. Seidler, 18 Ill.App.3d 705, 310 N.E.2d 421; People v. Chellew, 20 Ill.App.3d 963, 313 N.E.2d 284.) However, even if it could be said that the issue was before this court for review, the sentences are in conformity with the provisions of the Unified Code of Corrections. Under Section 8-4(c)(1) "the sentence for attempt to commit murder shall not exceed the sentence for a Class 1 felony" (Ill.Rev.Stat. 1973, ch. 38, par. 8-4), and under Section 18-2 of the Criminal Code, armed robbery is also a Class 1 felony. (Ill.Rev.Stat. 1973, ch. 38, par. 18-2.) Under Section 5-8-1(b)(2), the maximum term for a Class 1 felony



"shall be any term in excess of 4 years" and under Section 5-8-1 (c) (2) the minimum term for a Class 1 felony shall be 4 years unless the court sets a higher minimum term. (Ill.Rev.Stat. 1973, ch. 38, pars. 1005-8-1(b)(2), 1005-8-1(c)(2).) The statutory provision that the minimum term shall not be greater than one-third of the maximum term applies only to Class 2 and Class 3 felonies (Ill.Rev.Stat. 1973, ch. 38, pars. 1005-8-1(c)(3), 1005-8-1(c)(4)), and is not applicable to Class 1 felonies. (People v. Holman, 12 Ill.App.3d 307, 297 N.E.2d 752.) The sentences imposed in the case at bar were within the limits set for a Class 1 felony and, therefore, were not erroneous.

In view of the foregoing and from an examination of the record, it cannot be said that the dismissal of the pro se petition without amendment and without an evidentiary hearing was erroneous.

For the reasons stated, the judgment of the trial court is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.



59769

291A. 311



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
JUANITA RICHARDSON,	)	HONORABLE
	)	DAVID A. CERDA,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).
Before BURKE, P.J., GOLDBERG, J. and EGAN, J.

Juanita Richardson, defendant, was found guilty after a bench trial of the crime of battery (Ill.Rev.Stat. 1973, ch. 38, par. 12-3). She was sentenced to a term of 30 days in the House of Correction.

Since defendant does not challenge the sufficiency of the evidence against her, a recitation of the facts adduced at trial is unnecessary. The record reflects that when defendant's case was called, the trial judge asked defendant if she was seeking a continuance. Defendant replied she was not and that she was ready to proceed with trial. The trial judge, in questioning defendant, ascertained that she did not have the funds to hire an attorney. He then appointed the public defender's office to represent her. The case was then passed to allow counsel to confer with his client. When the case was recalled, the assistant public defender representing defendant announced that the plea was not guilty and demanded an immediate trial. After defendant waived the right to a trial by jury, the trial commenced.

Defendant's only argument on appeal is that she was denied effective assistance of counsel and due process of law because the assistant public defender who was appointed to represent her proceeded to trial on the same day that he was appointed, following a temporary passing of defendant's case. The gist of defendant's argument is that the late appointment of counsel is inherently prejudicial and per se demonstrates a violation of her constitutional right to effective assistance of counsel and due process of law.



In People v. Husar, 22 Ill.App.3d 758, 318 N.E.2d 24, defendant was convicted of unlawful possession of marijuana. On the day defendant's case was called for trial, the trial court appointed the public defender's office to represent defendant. The case was passed while counsel conferred with his client. When the case was recalled, the public defender answered ready for trial and the trial commenced. On appeal, the defendant argued that the dispatch with which his case proceeded to trial after the appointment of the assistant public defender deprived him of his right to effective assistance of counsel. After pointing out that this was not a case where the public defender had never talked to the defendant or where the trial judge restricted the conference between the public defender and the defendant, this court held (22 Ill.App.3d, p. 764):

"In this case, Husar was not prejudiced by the fact that the assistant public defender upon being appointed, and soon after a consultation, immediately announced he was ready for trial."

See also People v. Coleman, 45 Ill.2d 466, 259 N.E.2d 269, and People v. Kendall, 7 Ill.2d 570, 131 N.E.2d 519.

Defendant argues that she should not be required to make a showing of prejudice or demonstrate a lack of effective assistance of counsel, but that the burden of showing a lack of prejudice should be upon the State. Defendant's argument is contrary to established law in this State. The rule is well established that where a defendant alleges the incompetency of appointed counsel, the burden is upon defendant to demonstrate actual incompetency of counsel as reflected by the manner of carrying out his duties and that substantial prejudice resulted therefrom without which the outcome would probably have been different. (People v. Gill, 54 Ill.2d 357, 297 N.E.2d 135; People v. Harper, 43 Ill.2d 368, 253 N.E.2d 451.) Here, defendant has failed to demonstrate that appointed counsel was incompetent in the manner of carrying out his duties or that she was substantially prejudiced thereby. The fact,

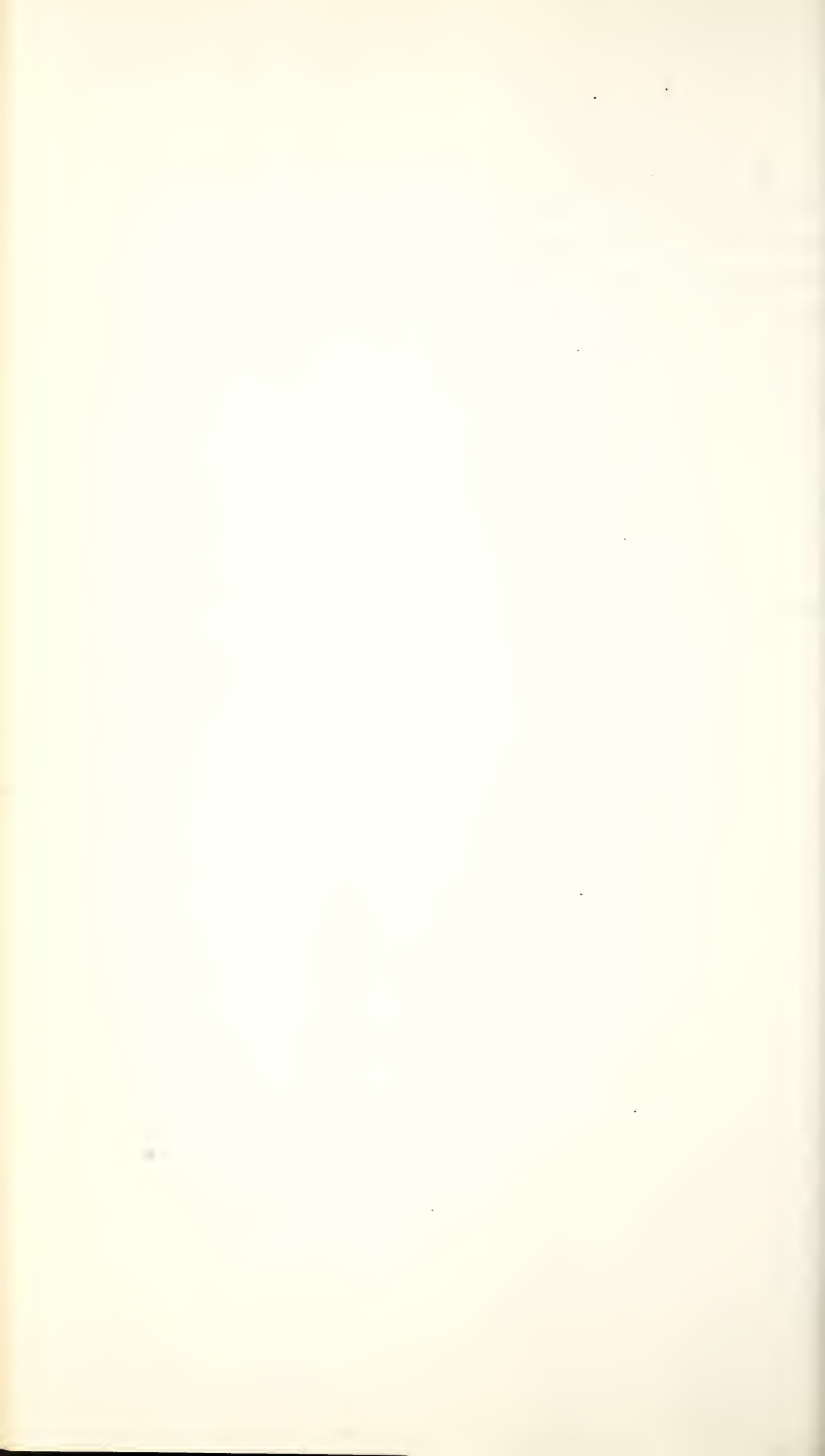


standing alone, that the public defender proceeded to trial after conferring with the defendant the same day he was appointed to represent her does not demonstrate that the defendant was deprived of her constitutional right to effective assistance of counsel.

For the foregoing reasons, the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

ABSTRACT ONLY.





60606

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
MICHAEL GARCIA,	)	HON. MEL R. JIGANTI,
	)	Presiding.
Petitioner-Appellant.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)

Before Burke, P. J., Goldberg and Egan, J.J.

Michael Garcia, hereafter petitioner, was convicted following a jury trial of murder, (Ill. Rev. Stat. 1967, ch. 38, par. 9-1(a)(2)), and was sentenced to a term of 25 to 50 years. Petitioner's direct appeal to the Illinois Supreme Court was transferred to this court. This court affirmed the conviction, (People v. Garcia (1972), 3 Ill. App. 3d 695, 279 N.E. 2d 506), and the Illinois Supreme Court denied leave to appeal, (50 Ill. 2d 649.) On February 14, 1973, petitioner filed a pro se post-conviction petition, (Ill. Rev. Stat. 1973, ch. 38, par. 122 et seq.) The public defender appointed to represent him, did not amend the petition but filed a certificate pursuant to Supreme Court Rule 651(c), (Ill. Rev. Stat. 1973, ch. 110A, par. 651(c)), and on May 6, 1974, the petition was dismissed. Petitioner now appeals contending: (1) he was denied the effective assistance of counsel in the preparation and presentation of his post-conviction petition; and, (2) he was never "heard" on his claim that he was denied his constitutional rights because the trial court applied the rule of res judicata and waiver which application denied him due process of law.

Petitioner's pro se post-conviction petition, filed February 14, 1973, alleged in relevant part as follows (quoted precisely as in the original):



3. The petitioner Michael Garcia has been denied his constitutional rights under the fifth and fourteenth amendments of the United States constitution and Article II. Section 2 of the Illinois State Constitution in that.

That defendant was arrested in the month of June 21, 1968 in the State of California, as he was returning by train to his base in the United States Marine Corps. And he was not informed that the co-defendant had made a confession that lead to the arrest of the defendant.

4. He also states that in reference by the prosecutor to the fact that defendant did not give an exculpatory statement prior to his trial was a violation of the defendants right to remain silent.

5. The in reference by the prosecutor to gruesome photographs of the decendent after they were refused admission into evidence was prejudicial to the defendant and deprived him of a fair trial.

Therefor the defendant was not proven guilty beyond a reasonable doubt. Therefore prays that the court will hear his prayer that he be grant a new trial, or that his sentence be reduced. Do to the fact a sentence of 25 to 50 years inforced on an 18 year old defendant, who had no previous conviction either felony or misdemeanor, was excessine in accordance.

6. As the sentence that was imposed on the defendant had cause his future in the United States Marine Corps. To give him a bad discharge.

The State moved to dismiss on the grounds that the allegations raised no constitutional question, were bare allegations not sufficient to require a hearing, and that since the direct appeal of petitioner's conviction was final, the doctrine of res judicata therefore applied. At a hearing on the motion on May 6, 1974, the assistant public defender indicated he would stand on the petition, without amendment, but argued that the petitioner had "never been heard" on two issues discussed in the appellate court decision -- whether the prosecution in cross-examination and in final argument used the petitioner's silence as an admission. The assistant public defender filed a certificate pursuant to Supreme Court Rule 651(c), stating he had consulted with the petitioner by mail and in person on April 17, 1974, that he had read the report of proceedings at the petitioner's



trial and concluded that the pro se petition "adequately and fully reflects all possible constitutional claims which this petitioner might raise under the Illinois Post-Conviction Hearing Act." The court then dismissed the petition stating it was familiar with the case and saw no substantial constitutional issue.

Petitioner now contends the representation afforded him did not meet the minimum level set forth in People v. Slaughter (1968), 39 Ill. 2d 278, 235 N.E. 2d 566. Petitioner's present counsel contends that the first substantive allegation in the petition, paragraph 3, should have been amended since it was unclear, particularly as it was not barred by the principle of res judicata because not discussed in the court's opinion on the direct appeal. It is further contended that trial counsel should have brought to the trial court's attention cases involving exceptions to the Illinois waiver doctrine (for example, People v. Hamby, 32 Ill. 2d 291, 205 N.E. 2d 456), and should have attached affidavits, records, or other evidence supporting the allegations as required by Ill. Rev. Stat. 1973, ch. 38, par. 122-2.

The failure of counsel in a post-conviction matter to amend the pro se petition does not, of itself, constitute inadequate representation. (People v. Goodwin (1972), 5 Ill. App. 3d 1091, 1092, 1093, 284 N.E. 2d 430.) There must be some reason "to believe the petition could have been successfully amended." (People v. Smith (1968), 40 Ill. 2d 562, 564, 241 N.E. 2d 413.) Counsel on appeal does not suggest, at least in any specific terms, how paragraph 3 could have been amended to present a substantial constitutional issue nor does he give any suggestion about what the substance of such a constitutional issue might be. The difficulty with paragraph 3 is not that it is factually insufficient or inarticulately drafted, but that it does not even suggest any deprivation of constitutional rights. Since paragraph 3 presented no factual issue, counsel's failure to attach any affidavits or other proof



to support the allegation is irrelevant. It is also clear that paragraph 6 likewise states no substantial deprivation of constitutional rights. No matter how skillfully these allegations might have been drafted, there is no indication that they might somehow give rise to any substantial violation of petitioner's constitutional rights.

Counsel's failure to cite case law concerning the waiver doctrine cannot be considered incompetence of counsel. There is nothing in the record to indicate that the experienced trial judge was unaware of the fundamental principles of law governing post-conviction matters. Reference to the appellate court opinion on the direct appeal clearly shows that the court dealt with points petitioner raised in the post-conviction petition and which he argues in this court. Since these matters were adversely determined against the petitioner on the direct appeal, counsel appointed for petitioner in the trial court no doubt concluded that these issues were not "possible" constitutional claims that petitioner might successfully raise under the Illinois Post-Conviction Hearing Act, as he stated in the certificate he filed pursuant to Rule 651(c). Counsel was not required to amend the petition merely for the sake of form, and petitioner's claim in this court that he was denied effective representation in the trial court is therefore without merit.

Petitioner also contends he was denied due process of law because he was not "heard" on the merits of his claims on the direct appeal. Reference to the appellate court opinion shows that although the court noted that since the petitioner did not object in the trial court his objections were therefore waived for purposes of review. However, the appellate court did in fact deal with the substance of each of these issues and decided them against the petitioner on the merits. Consequently the appellate court decision is res judicata on these issues. People v. James (1970), 46 Ill. 2d 71, 263 N.E. 2d 5.



Finally, citing U. S. ex rel. Williams v. Brantley (7th cir. 1974), 502 F. 2d 1383, petitioner contends the trial court's order denies petitioner his fundamental right of due process of law. The cited case is not in point because it concerns the requirement that a state prisoner exhaust his state remedies before the remedy of federal habeas corpus is available. Whether the petitioner has exhausted his state remedies so as to be able to invoke federal habeas corpus relief is not an issue in this case. Williams suggests that because of the Illinois res judicata waiver doctrine as applied to post-conviction matters the prospect for a successful appeal of an unsuccessful post-conviction petition where there has been a direct appeal is so minimal that such an appeal may be considered "futile" and should not be a prerequisite to federal habeas corpus relief. Whether this is so or not, it does not follow that the Illinois res judicata doctrine should be relaxed. Petitioner has had one review of his claims on the merits on the direct appeal and this record does not suggest the existence of any considerations of fundamental fairness that might impel a relaxation of the res judicata doctrine under the circumstances of this case. (See People v. Frank (1971), 48 Ill. 2d 500, 272 N.E. 2d 25.) The court properly dismissed the pro se petition. Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only).



3D
291A. 623



60707

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. EARL ARKISS,
MILTON BROWN,	)	Presiding
)	
Defendant-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Egan and Simon, JJ.

Milton Brown, defendant, was charged by indictment with two counts of aggravated battery and one count of attempt murder (Ill. Rev. Stat. 1973, ch. 38, pars. 8-4 and 12-4). On October 31, 1973, defendant entered a negotiated plea of guilty to one count of aggravated battery. The remaining two charges were dismissed. He was sentenced to a term of two to ten years. Defendant appeals arguing that he did not knowingly and understandingly enter his plea of guilty.

The record reflects that when defendant's case was called for trial on October 31, 1973, the trial court received a report from the Psychiatric Institute of the circuit court of Cook County, which found the defendant competent to stand trial. Privately retained defense counsel at that time stated that he was not satisfied with the conclusions reached in the report and that if he were to remain on the case he would like to have a private psychiatrist examine the defendant. Counsel also stated that there was a dispute with the defendant over certain fees which would be necessary in order to have such tests performed. The case was then passed. When the case was recalled, defense counsel, in defendant's presence, requested a pretrial conference with the court. The trial court advised the defendant what would occur at a pretrial conference. Defendant gave his consent and the conference was held.

Thereafter, when the case was recalled, privately retained defense counsel, in defendant's presence, stated that defendant



wished to enter a plea of guilty to one count of the indictment charging aggravated battery. The trial judge, by questioning defendant, determined that defendant understood that as a result of the pretrial conference, it was agreed that upon a plea of guilty to the charge of aggravated battery, he would be sentenced to a term of from two to ten years. The facts which provided a basis for the indictment were then stipulated by the parties. Defendant stated that the stipulated facts were substantially correct. Defendant again stated his desire to enter a plea of guilty. The trial judge informed defendant that he was charged with aggravated battery and he explained what constituted the crime of aggravated battery. Defendant was warned of the maximum and minimum possible penalties for the crime of aggravated battery. The trial judge informed defendant that he had a constitutional right to remain silent and that by entering a plea of guilty he would waive that right. Defendant stated that he was entering a plea of guilty voluntarily and that no promises, threats or coercion had been used to induce him to enter a plea of guilty. The trial judge informed defendant that he was entitled to remain silent, that the law presumes him innocent until he is proven guilty, that he had the right to cross-examine the witnesses of the State, that he had a right to have a grand jury decide whether to indict, and that he had a right to have his case heard by a petit jury. Defendant stated that he understood each of his rights. A written jury waiver and a waiver of a presentence investigation was signed by the defendant. The plea of guilty was then accepted by the trial court and defendant was sentenced to a term of two to ten years.

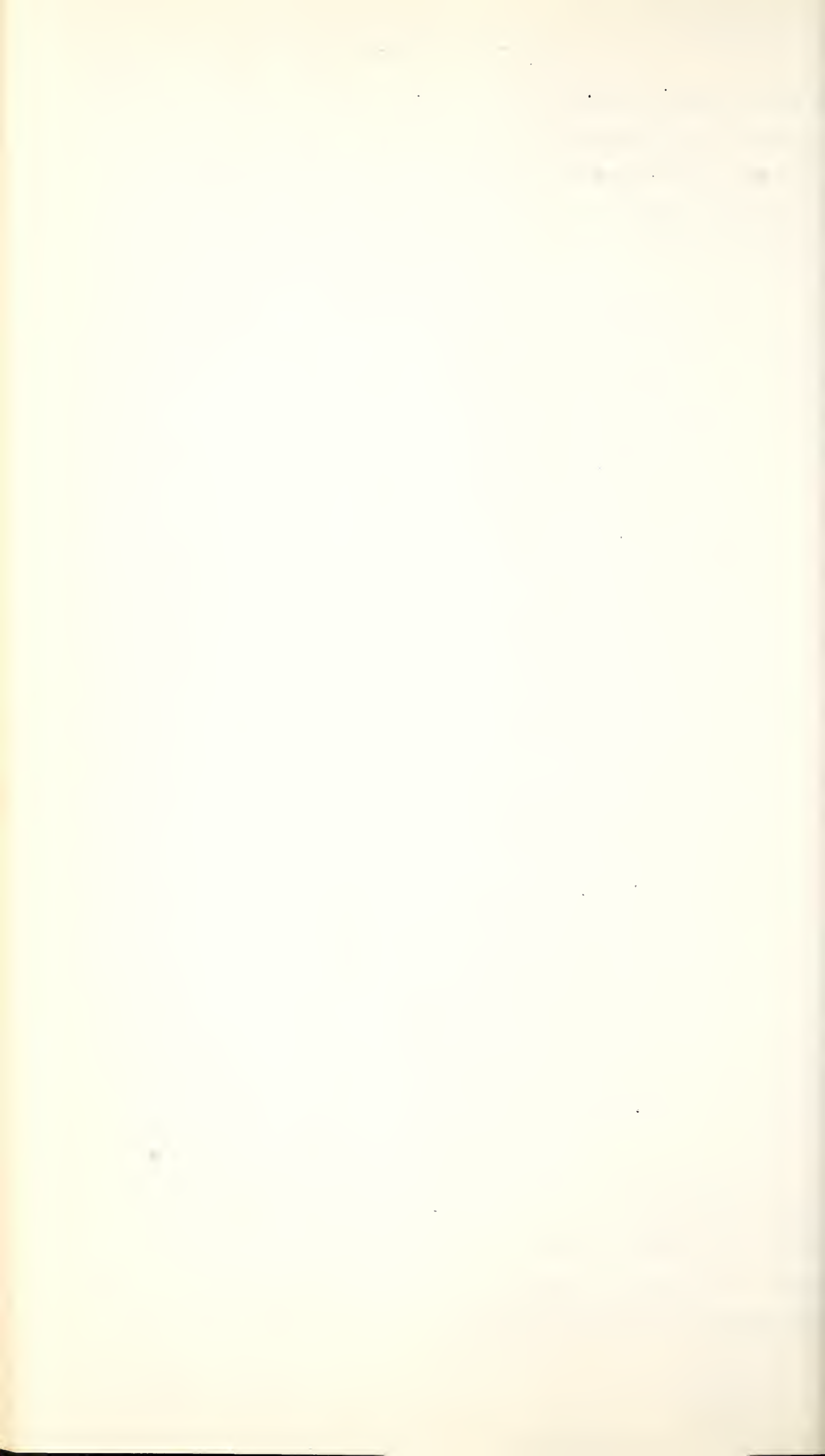
Defendant's only contention on appeal is that he did not knowingly and understandingly enter his plea of guilty. Defendant argues that the trial judge in admonishing him failed to adequately explain his right to a jury trial and failed to admonish him that by entering a plea of guilty he was waiving each of his constitutional rights and that there would not be a trial of any kind.



Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A, par. 402) governs the acceptance of pleas of guilty. The rule does not require a strict literal adherence to every word but requires only substantial compliance with its terms. People v. Mendoza, 48 Ill. 2d 371, 270 N.E.2d 30.

In the case at bar defendant, represented by privately retained counsel, entered a negotiated plea of guilty only after a pre-trial conference with the court knowing the exact sentence which he would receive. Prior to entering his plea of guilty, the trial judge carefully admonished the defendant that he was charged with aggravated battery. The trial judge explained what constituted aggravated battery and the possible sentences to which defendant could be sentenced. The trial judge admonished defendant that he had a constitutional right to remain silent, to cross-examine the witnesses against him, to insist that the State prove him guilty beyond a reasonable doubt and to have his case heard by a petit jury. Defendant stated that he was voluntarily entering a plea of guilty and that no force, threats or coercion had been used to induce him to enter his plea of guilty. Defendant voluntarily signed a jury waiver. Defendant persisted in his plea of guilty which was then accepted by the trial court. Defendant was sentenced in accord with the plea agreement which had been made part of the record and to which defendant agreed prior to entering his plea of guilty. After a careful review of the entire record, we conclude that the admonishments given the defendant were sufficient to constitute substantial compliance with Supreme Court Rule 402. The record adequately demonstrates that defendant's plea of guilty was knowingly and voluntarily entered.

Defendant also argues that the trial judge was under a duty to take special care to insure that he understood the proceedings since the defense attorney had informed the court that he disagreed with the conclusion reached in the psychiatric examination of the defendant which found him competent to stand trial. Here, the

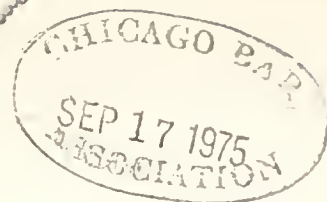


defendant took an active part in the plea proceedings. Defendant personally stated that the stipulated factual basis for the indictment was correct and during the plea of guilty defendant answered each of the questions posed to him by the trial court. The record demonstrates that defendant at all times knew what was happening and was in full agreement with the proceedings.

Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED





PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
NATHAN BLAKLEY,	)	HONORABLE
	)	HOWARD MILLER,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before BURKE, P.J., GOLDBERG, J. and EGAN, J.

Nathan Blakley, defendant, was charged with the offense of battery in violation of Section 12-3 of the Criminal Code (Ill. Rev.Stat. 1973, ch. 38, par. 12-3). In a bench trial, defendant was found guilty and sentenced to six months in the House of Correction. On appeal the defendant contends that the State did not prove beyond a reasonable doubt that he was the assailant of the complaining witness.

At the trial, Juan Leon, a Chicago police officer, testified that at approximately 12:10 a.m. on May 28, 1974, in response to a call for help, he went to the rear of the building at 2421 East 74th Street, Chicago. He observed a woman lying on her back with her head under the porch, her legs open and a man straddling her. At the time another fellow, whom Leon identified in open court as the defendant, was standing there observing what was going on. When Leon and his partner arrived, the man who was straddling the woman got up and ran and Leon's partner chased him. Leon made the defendant get on the ground, put his hands behind his back, and then handcuffed him. Leon said Mrs. Bert, the complaining witness, stated the other fellow had raped her and defendant had forced her to have "oral sex" with him; "and that he was waiting his turn". On cross-examination, Leon said defendant told him he had left a pool room and "was just passing through" the gangway. Leon said Mrs. Bert described the person who ran away as being about five feet, six or seven inches tall, a light complexioned male Negro, about 22 or 23 years old, and wearing a fatigue-like

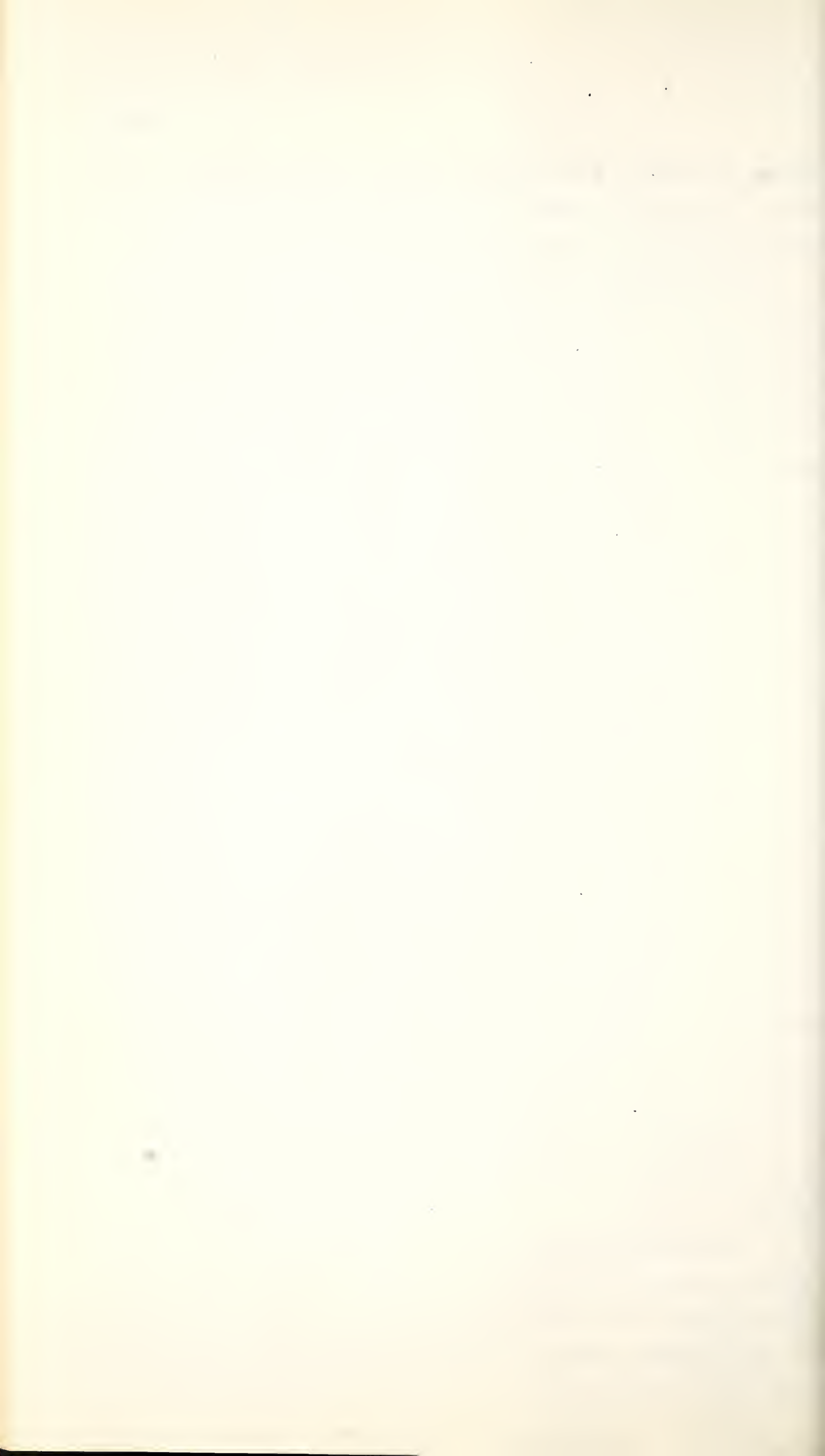


jacket and pants. Leon further stated that when he arrived at the scene, defendant was about five feet away from the feet of the complaining witness and the man who was straddling her.

Mrs. Catherine Bert testified that shortly after midnight on May 28, 1974, she was walking north on Phillips Avenue, and two men were following her; that she got frightened and as she started to run, the two men grabbed her arm and said "Come on, bitch. Come on" and pulled her in the alley. Mrs. Bert said one man, whom she identified as the defendant, was behind her and the other man was pulling her from the front; that defendant urinated on her from behind and kicked her in the back; and that she slipped and fell. Mrs. Bert said the men told her to take off her pants, which she did, and they made her lie down; that after the men made her lie down, defendant came in front of her and told her "to suck his dick"; that she told him "I don't know how" and he said "You better, bitch"; that she tried and defendant got mad; that then the other man said "Let me try. Let me get at her"; that the other man got on top of her; and that defendant was then standing at her feet "waiting for his turn" when the police arrived. On cross-examination, Mrs. Bert said she didn't see either of the men clearly before she got to the gangway because she was "scared and frightened". In answer to the question "At no time then did you really see Mr. Blakley until after the police came; is that correct?" Mrs. Bert answered "I seen him". In answer to the question "At no time did you clearly see Mr. Blakley as one of the men that came up behind you until after the police came?" Mrs. Bert answered "No".

In answer to a question by the trial court, Police Officer Leon said he did not notice whether defendant's "fly of his trousers was zipped".

Defendant testified he left a pool room to go to the apartment of Billy Pippins at 2421 East 74th Street, Chicago; that he rang the front bell but there was no answer so he went around to the back of the building; that as he got to the back of the building he saw a lady and a man who were under the porch on the first floor; that he



stopped; and that in about a minute he looked over his shoulder and saw the police. Defendant said after the police arrived, they shined a flashlight under the porch on the man and girl on the ground; and that the man got up and ran. Defendant stated that he just stood there, and that both of the police officers walked over and told him to lie down on his stomach and put his hands behind his back. Defendant said he did not know the other man or Mrs. Bert; and that at the time Mrs. Bert told the police "He raped me". Defendant further testified that he did not lay a hand on Mrs. Bert; and that he did not stand behind her and did not urinate on her. Defendant stated he could see the other man clearly; and that he gave a description of him to the police.

Defendant, who admits being present at the time of the offense, argues that Mrs. Bert did not have an opportunity to definitely identify him as one of her assailants; and that his guilt is based on circumstantial evidence which is not convincing or conclusive. Defendant's argument that Mrs. Bert failed to identify him as her assailant is based upon her testimony that when she was initially assaulted on the street, the man, whom she later identified as defendant and the one who had urinated on her and kicked her from the back, was behind her. However, Mrs. Bert also testified that later when they were in the gangway, defendant came in front of her and ordered her to perform an act of oral copulation. There is no testimony in the record that at that time the defendant was behind her. On the contrary, if defendant forced Mrs. Bert to attempt to have oral copulation with him, they would be facing each other, and Mrs. Bert so testified. Police Officer Leon testified that while they were in the gangway, Mrs. Bert stated the man who fled had raped her and defendant had forced her to have oral copulation with him and was "waiting his turn". Further, defendant testified that a light, which was burning nearby, was bright enough for defendant to see the other man who fled; and that he gave a description of the man to the police. Under these circumstances, Mrs. Bert had ample time and opportunity to identify defendant as the man who forced her to have oral copulation.



Defendant denied he assailed Mrs. Bert. He said he was on his way to visit a friend, Billy Pippins, who lived in the building adjacent to the gangway; and that when he came into the gangway he saw a man and Mrs. Bert under the porch of the building.

While in the case at bar there is no question that the defendant's version of the incident directly contradicts the version presented by the State, but that, in itself, does not render the State's evidence insufficient to support a conviction. (People v. Brown, 52 Ill.2d 94, 106, 285 N.E.2d 1.) It is well settled that the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, providing the witness was credible and viewed the defendant under such circumstances as would permit a positive identification to be made. (People v. Stringer, 52 Ill.2d 564, 569, 289 N.E.2d 631; People v. Turner, 19 Ill.App.3d 697, 699, 312 N.E.2d 421.) Here, the record presents a question of the credibility of the witnesses. In a bench trial, it is for the trial judge to determine the credibility of the witnesses and the weight to be given their testimony and, unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. (People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. Spriggs, 20 Ill.App.3d 804, 314 N.E.2d 573.) On appeal, the determination of the trial judge, who had the opportunity to view the witnesses and hear their testimony will not be lightly set aside. (People v. McGhee, 20 Ill.App.3d 915, 314 N.E.2d 313; People v. McNeal, 8 Ill.App.3d 109, 289 N.E.2d 193.) The trial judge found the testimony of the State's witnesses believable and accepted their version of the incident. In light of the record, it was not error for the trial judge to find that defendant was guilty beyond a reasonable doubt.

There is no reversible error and, therefore, the judgment of the trial court is affirmed.



291A 615



60414

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
vs.)
)
PERCY NERO,) HONORABLE FRANK J. WILSON,
) Presiding.
Defendant-Appellant.)

BEFORE STAMOS, LEIGHTON and HAYES, JJ.

PER CURIAM:

Percy Nero, defendant, was admitted to probation on July 26, 1971, for concurrent five year terms upon his pleas of guilty to indictments charging two separate offenses of burglary, in violation of section 19-1 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 19-1). After notice and hearing on December 20, 1973, defendant's probation was revoked for a violation of the conditions of his probation, and on January 10, 1974, he was sentenced to concurrent penitentiary terms of one year to three years in addition to concurrent three-year periods of parole upon satisfaction of the penitentiary terms.

Defendant contends on appeal that the action of the trial court in imposing the periods of parole was both illegal and unconstitutional, arguing that he is entitled to credit for time served against and in full satisfaction of the penitentiary terms imposed by the trial court and that he should therefore immediately be released from custody and immediately be discharged from his parole status.¹ The State concedes that defendant is entitled to credit for time served against and in full satisfaction of the penitentiary terms imposed by the trial court, but argues

1. It should be noted that defendant is currently being held in custody, pending hearing, for an alleged violation of the parole term here challenged.



that he is not entitled to discharge from his parole status since the action of the trial court in that regard was neither illegal nor unconstitutional. We have reviewed the record in this case and agree that defendant is entitled to credit for time served against and in full satisfaction of the penitentiary terms imposed by the trial court upon the 1971 burglary convictions. The sole matter before this court therefore is whether the action of the trial court in imposing the additional concurrent parole periods was legal and whether the statute under which the court acted was constitutional.

Defendant was found guilty of the instant offenses and was placed on probation in July 1971, prior to the effective date of the Unified Code of Corrections on January 1, 1973; however, he was sentenced to the penitentiary and the instant periods of parole were imposed upon revocation of that probation subsequent to the effective date of the Code. Defendant has elected to be sentenced according to the provisions of the Unified Code of Corrections and he concedes that all, not some, of its provisions apply to him. See Ill. Rev. Stat. 1973, ch. 38, pars. 1001-1-1, et seq.; ch. 131, par. 4.

Defendant argues that the trial court failed to comply with section 5-6-4(e) of the Code which provides that the trial court, upon a finding of a violation of probation, "may impose any other sentence available under section 5-5-3 at the time of initial sentencing," because on July 26, 1971, the date of which he maintains he was "initially sentenced," the statute in effect made no provision for a sentence of parole in addition to a sentence of incarceration. See Ill. Rev. Stat. 1973, ch. 38, pars. 1005-5-3, 1005-6-4(e). Clearly, however, the reference of the "sentence" to be imposed "at the time of initial sentencing" is section 5-5-3 of the Unified Code of Corrections; having elected to be sentenced under the Unified Code of Corrections, defendant is bound by its



terms.

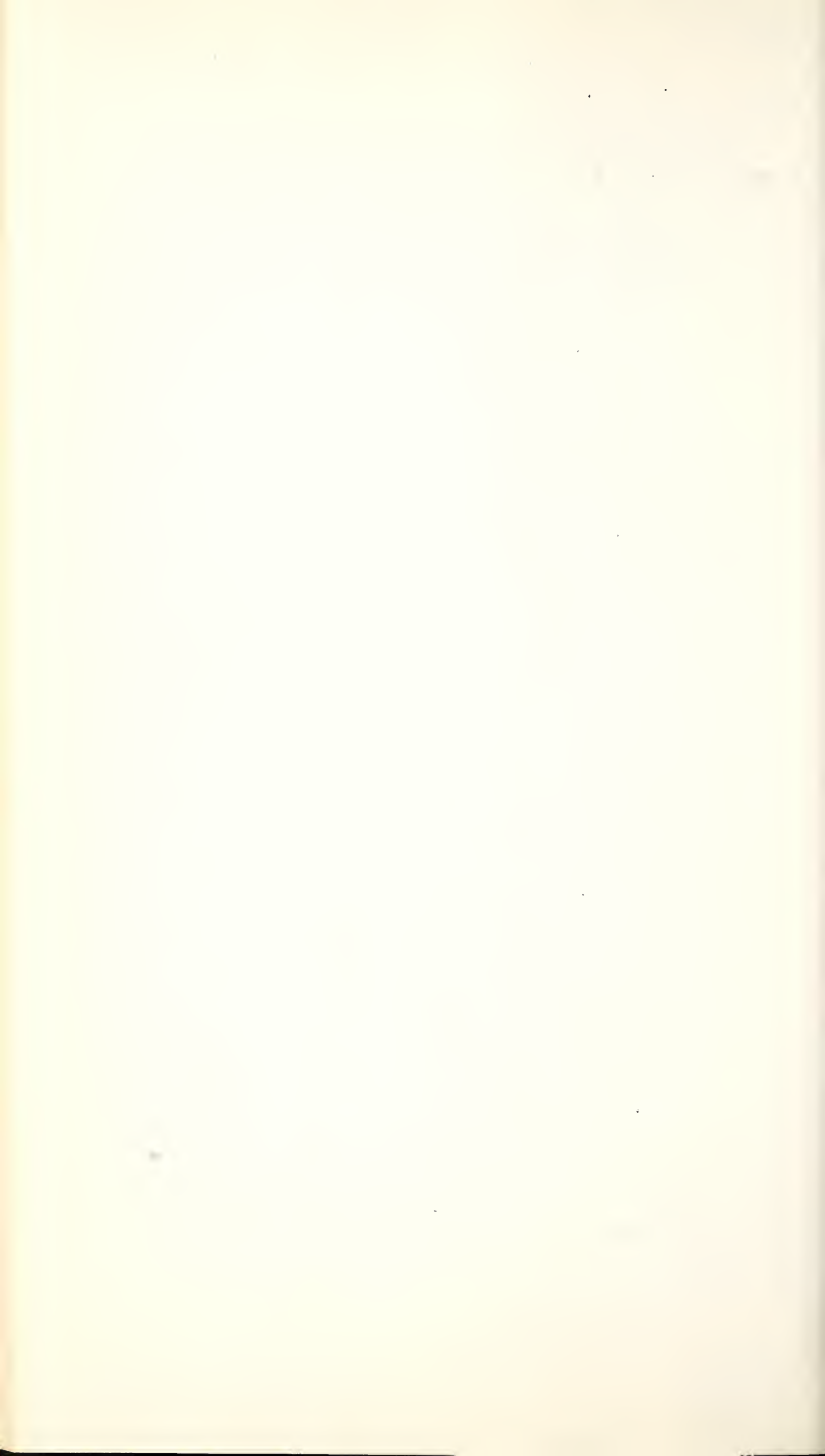
Section 5-8-1(e) of the Code specifically provides (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(e)):

"Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:

- (1) for murder or a Class 1 felony, 5 years;
- (2) for a Class 2 felony, or a Class 3 felony, 3 years;
- (3) for a Class 4 felony, 2 years."

Thus, the concurrent three-year periods of parole would have been imposed upon defendant by force and effect of the Code, whether or not expressly ordered by the trial court, since defendant chose to be sentenced thereunder. Therefore, the concurrent three-year periods of parole were not imposed upon defendant in violation of the Code.

Defendant's challenge to the constitutionality of the court's action in imposing the periods of parole is in reality a challenge to the constitutionality of the provisions of the Unified Code of Corrections which permit imposition of such periods of parole. See Ill. Rev. Stat. 1973, ch. 38, pars. 1003-3-9(a) and 1005-8-1(e); see also People v. Wills (1974), 23 Ill.App.3d 25, 319 N.E.2d 269; and People v. Wills, ____ Ill.2d ____ (#47039, May 15, 1975). Defendant's constitutional challenge cannot be entertained on this appeal since he raised no objection to the court's action at trial nor did he at that time object to the constitutionality of those provisions of the Code. Furthermore, the constitutional objections relied upon most heavily by defendant on this appeal, those of the alleged violation of separation of powers and of the basic constitutional guarantees, were not raised until the filing of the reply brief on this appeal; the constitutional objection relating to ex post facto was raised for the first time in the original



brief on this appeal. Under these circumstances defendant cannot now be heard to complain in this regard. (People v. Eubank (1970), 46 Ill.2d 383, 263 N.E.2d 869; People v. Cooper (1974), 17 Ill. App.3d 934, 308 N.E.2d 815; Ill. Rev. Stat. 1973, ch. 110A, par. 341(e) (7), (g).) Nor do we consider there to be a denial of fundamental fairness under these circumstances since defendant elected to be sentenced under the terms of the Unified Code of Corrections and he is in no worse position having been sentenced thereunder than if he had been sentenced under the statute in effect at the time of the commission of the offense. (Compare: Ill. Rev. Stat. 1971, ch. 38, par. 19-1(b); 1973, ch. 38, pars. 19-1(b), 1005-8-1(b) & (c).) Finally, defendant cannot be heard to complain that he could have been subject to a term of incarceration exceeding the maximum of 20 years provided by the Unified Code of Corrections for a Class 2 felony; the maximum term of imprisonment imposed by the trial court in the instant case was three years.

For these reasons the judgment of the circuit court of Cook County, revoking defendant's probation and imposing concurrent three-year periods of parole in addition to the penitentiary terms of one year to three years, is affirmed.

JUDGMENT AFFIRMED.



UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JUL 2 - 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	for the 17th Judicial Circuit,
vs.	)	Winnebago County, Illinois
)	
CARLOS KING, a/k/a/ CHARLES)	
JACOBS,)	
)	
Defendant-Appellant.)	

MR. JUSTICE DIXON delivered the opinion of the court:

Defendant, Carlos King, was indicted by the Winnebago County Grand Jury on one count of robbery. Subsequently, defendant entered a plea of guilty to the charge, not pursuant to a plea agreement. Defendant was sentenced to two to six years imprisonment. On appeal defendant alleges error in that he was not sufficiently admonished of the nature of the charge against him and in that the court below failed to determine whether his plea was voluntary prior to acceptance of the plea, all in violation of Rule 402.

The issues on appeal are:

Did the court below fail to adequately admonish defendant and determine that he understood the nature of the charge against him?

Did the court below err in not determining whether defendant's plea was voluntary prior to acceptance of the plea?

I. Defendant's argument that the trial court did not sufficiently admonish him to determine that he understood the nature of the charge against him is without merit. Rule 402 requires only substantial, not literal, compliance and the entire record is to be considered in determining whether a defendant understands the nature of the charge against him. (Ill. Rev. Stat. 1973, ch. 110A, par. 402; People v. Krantz, 58 Ill. 2d 187.) The entire record in the instant case shows the following:



at his initial appearance the nature of the charge against him was fully explained to defendant. At the preliminary hearing the complaining witness testified as to the facts of the robbery in defendant's presence, to which testimony defendant did not demur. At the guilty plea hearing the state's attorney stated the factual basis of the offense, to which statement defendant did not demur. Defendant signed a statement detailing and admitting the instant offense and said that it had been read to him. At the plea hearing defendant re-read this statement at the request of the judge and admitted that it was true insofar as is relevant here.

Defendant had several prior convictions, including one for robbery and one for armed robbery. People v. Battie, 19 Ill. App. 3d 806, indicates that one's previous experiences with the criminal justice system can be taken into account in deciding whether there was substantial compliance with Rule 402.

In short, Krantz, supra, makes it clear that Rule 402 does not require that each element of the offense be explained to the defendant by the trial judge, so long as the whole record indicates defendant's understanding of the nature of the charge against him. The whole record here clearly indicates that defendant understood the nature of the charge against him. See also, People v. Gratton, 19 Ill. App. 3d 503; People v. Diaz, 15 Ill. App. 3d 280.

II. Defendant does not claim that his plea was involuntary. Instead, he argues that Rule 402 was not complied with because the judge did not specifically question him as to the voluntariness of the plea until after the judge said he would accept the plea. Defendant also contends that not specifically inquiring into the possible use of force, threat or promises in obtaining the plea was a violation of Rule 402. The questioning of defendant as to voluntariness was as follows:



"Mr. Gemignani: I would like to state for the record, your Honor, the People have not engaged in any plea negotiations or made any offers to the defendant in this matter of any kind. Is that true, Mr. Beu?

Mr. Beu: Yes, that's true.

Mr. Gemignani: Is that true, Mr. Defendant?

The Defendant: Yes.

The Court: You are pleading guilty voluntarily?

The Defendant: Yes, I am.

The Court: Knowing what you are doing?

The Defendant: Yes."

Where the trial court does not specifically inquire into the inducement of the plea by force, threats or promises, the plea will not be overturned if, looking at the entire record, it can be determined that the guilty plea was voluntary and not induced by force, threat or promises. (People v. Ellis, 59 Ill. 2d 255. See also People v. Gibson, 11 Ill. App. 3d 875.) Ellis involved a plea agreement, unlike the instant case. However, the rule enunciated in Ellis is applicable to the instant case as well, because the basis of the Ellis rule is the indication of voluntariness from the entire record. Indeed, the judge in the instant case specifically asked defendant if he was pleading guilty voluntarily, unlike Ellis where the defendant was simply asked if he was pleading guilty because he was guilty. Given the absence of inquiry into voluntariness in Ellis, it is clear that the timing of the inquiry into voluntariness in the instant case is at best harmless error. In People v. Warship, 59 Ill. 2d 125, 319 N.E. 2d 507, compliance with Rule 402 was found where even though a factual basis for the plea was not elicited at the plea hearing, it was later supplied at the hearing in aggravation and mitigation. To the same effect is People v. Edmonds, 15 Ill. App. 3d 1073. Also, Gibson, supra, indicates that defendant's experience with the criminal justice system is a factor



to be considered regarding the voluntariness of a guilty plea.

It is clear upon looking at the entire record, that defendant's plea was voluntary.

For the foregoing reasons, the judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

Rechenmacher, P.J., and Thomas J. Moran, J., concur.

74-29

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 2, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JUL 2 - 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 17th
vs.	)	Judicial Circuit,
	)	Winnebago County, Illinois.
MICHAEL WHITE,)	
)	
Defendant-Appellant.)	

MR. JUSTICE DIXON delivered the opinion of the court:

Defendant, Michael White, was indicted by the Winnebago County Grand Jury on two counts of armed robbery. Pursuant to plea negotiations, defendant plead guilty to one count and the other count was dismissed. Defendant was sentenced to five to fifteen years imprisonment. On appeal defendant contends that he was not properly admonished under Rule 402 as to the possible maximum sentence he could receive and as to the nature of the charge against him.

The issues on appeal are:

- I. Was defendant properly admonished, pursuant to Rule 402, as to the maximum sentence he could receive for the instant offense?
- II. Was defendant properly admonished as to the nature of the charge against him?

I. Defendant argues initially that he was not properly admonished as to the possible maximum sentence in that he was not informed of a more severe penalty possible under Sec. 5-8-2(a) of the Code of Corrections. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-2(a).) This section provides for up to twice the maximum sentence, under certain conditions, for one who uses a firearm in the conviction of a felony, among other things. Defendant's argument is without merit.



Since armed robbery has an indeterminate maximum sentence, Sec. 5-8-2(a), supra, is logically inapplicable. Also, Sec. 5-8-2(c) clearly indicates that no admonishment need be given as to the applicability of Sec. 5-8-2(a) if the defendant is not sentenced pursuant thereto. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-2(c).) Sec. 5-8-2(a) was not applied in the instant case. The sentence given was the one agreed on in plea negotiations, which sentence was specifically concurred in by the trial court before accepting defendant's plea. Sec. 5-8-2(a) could be applied, though it was not, only to the instant offense. It does not refer to prior offenses and it is clear from the record that the trial court was referring to a possible prior armed robbery conviction only in regard to exposing defendant to a possible higher sentence as a repeat offender.

Defendant next argues that he was not properly admonished as to possible consecutive sentences. It is to be noted that the judge referred to consecutive sentences before being informed of the plea agreement, which in dismissing one of the two counts against defendant made consecutive sentences impossible. Also, the court admonished defendant on this point as follows:

"The Court: Now, consecutive sentences are also a possibility. In other words, one sentence added to another, do you understand that?"

Mr. White: Yes."

Defendant cites People v. Zatz, 13 Ill. App. 3d 322, in support of his position. In Zatz, a guilty plea was vacated because the trial court did not inform the defendant of possible consecutive sentences. However, in Zatz, the defendant was charged with five counts of forgery, thus distinctly raising the possibility of consecutive sentences, unlike the instant case where defendant plead guilty to only one charge. Also, Zatz did not involve a negotiated plea, as did the instant case where defendant got exactly the sentence he had agreed to. In addition, Zatz has been expressly overruled and no error found where the judge did

not admonish as to consecutive sentences, because the sentence given was concurrent. (People v. Wills, 23 Ill. App. 3d 25, 32; partially reversed on other grounds, People v. Wills, _____ Ill. 2d _____, opinion filed May 19, 1975 No. 47039; see also, People v. Reed, 3 Ill. App. 3d 293.

Defendant also argues that he was not properly admonished as to the maximum sentence for armed robbery. Defendant was admonished on this point as follows:

"The Court: Now, Mr. White, armed robbery in Illinois is called a class one felony, and is punishable by imprisonment in the penitentiary for not less than four or any number of years, that is not less than four years nor more than, without limit, a limitless number of years * * *."

Defendant, represented by counsel, was also informed of the mandatory parole period, the possible fine, that the offense was non-probationable, that the sentence could be greater if defendant was a prior offender, and of the consecutive sentence possibility. The cases defendant cites in support of his argument are readily distinguishable, in that they all involved an explanation of the maximum sentence as "indefinite" or "indeterminate." The court in the instant case advised defendant that the maximum sentence was " * * * without limit, a limitless number of years." The sentence admonition in a class 1 felony is to be stated " * * * in terms that an ordinary person in the circumstances of the accused could readily understand." (People v. Williams, 16 Ill. App. 3d 199, 200.) In Williams the admonishment as to the maximum sentence was " * * * to infinity, which to me means the end of the world." (Williams, supra, at 200.) Unlike Williams, the sentence here was the subject of plea bargaining. Defendant knew exactly what his sentence would be as the judge concurred in the plea agreement. In addition, the admonition given in the instant case is surely as clear as that given in Williams.



Finally, there is nothing in the record which indicates that defendant did not understand the possible maximum sentence he could theoretically receive. Substantial compliance with Rule 402 is found if, as here, prior to acceptance of a defendant's guilty plea he is advised of the sentence that might be imposed if the plea is accepted. (People v. Barr, 58 Ill. 2d 187.) In Barr, no error was found even though the court did not give any admonition as to the possible sentence, since the plea agreement was kept and the defendant had counsel.

There was no error in the admonishment as to sentence which defendant received.

II. Defendant also contends that he was not properly admonished as to the nature of the charge against him. People v. Krantz, 58 Ill. 2d 187, holds that the entire record is to be looked at in determining whether the defendant understood the nature of the charge. In Krantz, the judge simply informed the defendant that he was charged with forgery and the state's attorney recited the anticipated evidence that the prosecution would put on, to which recital neither the defendant nor his attorney demurred. In the instant case the judge paraphrased the total indictment, not simply restating the charge, and the state's attorney recited the evidence against defendant without any disagreement by defendant or his attorney. There was an adequate determination that defendant understood the nature of the charge. See also, People v. Diaz, 15 Ill. App. 3d 280.

For the foregoing reasons, judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

Rechenmacher, P.J., and T.J. Moran, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz: ---



FILED

JUL 2 - 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	THE EIGHTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	DUPAGE COUNTY,
	)	ILLINOIS.
ROBERT JOHNSON,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

On a bench trial, the defendant was found guilty of burglary and armed robbery and was sentenced to six to eighteen years, with credit for time served. On appeal, he contends that he was improperly convicted and sentenced for burglary and armed robbery because both crimes arose out of a single course of conduct. We disagree and affirm.

At the trial, Mrs. Ruehle testified that at 11:15 a.m. on October 18, 1972, she looked out of a window in the upstairs bedroom of her home and observed a green car in her driveway and saw a black man, wearing a black leather jacket and cap, approach the front door of her home. He was subsequently identified in court by her as the defendant. She testified that from her bedroom window she observed him walk to the door, and peer through the window in the door and proceed to the rear of the house, where he removed a storm window from the bathroom window. He then climbed through the window into the house. At this point, she attempted to leave her home before being discovered by the intruder, but upon reaching the front door, saw another man standing outside near the door, and hesitated

before opening the door. At the same time, the defendant, who had entered the house through the window in the rear of the building, proceeded through the house to the front door. Upon discovering Mrs. Ruehle, he grabbed her around the neck, stuck a knife to her throat, threatened her life, and demanded money.

He then forced her into the first floor bedroom where he bound her hands and feet and gagged her with a bedsheet that he had torn into strips. He then took her to the second floor bedroom. There, he took money from her wallet and searched dresser drawers and closets. Periodically, he took items from the upstairs bedroom to the front door, where he delivered them to his accomplices. During the entire episode, he repeatedly threatened to kill her.

After he had left the premises, she loosened the bindings on her hands and feet, looked out of the bedroom window, and saw a police car drive into the driveway of her home. The defendant and his accomplices, who had fled on foot leaving their green vehicle in the driveway, were apprehended by police officers a short distance from the house. Several wrist watches taken from the Ruehle residence were found in the defendant's pocket. Thereafter, the green vehicle was searched, and the other items from the Ruehle residence were found.

The trial court found the defendant guilty of burglary and armed robbery, and sentenced him on both counts to serve six to eighteen years imprisonment, with credit for time served.

On appeal, the defendant contends that the conviction of burglary must be reversed and vacated, citing People v. Lilly

(1974), 56 Ill. 2d 493, 309 N. E. 2d 1. In Lilly, convictions for rape and indecent liberties with a child were based upon a single act of the defendant. There, the court reversed the conviction for indecent liberties, and reasoned that since both offenses were founded upon a single act of the defendant, there could be only one conviction. In the case at bar, the defendant argues that the conviction for burglary must be reversed since the burglary and armed robbery arose out of the same course of conduct.

We do not agree. In Lilly, a single act formed the bases for multiple offenses, each requiring common elements of proof. Here the burglary and armed robbery were separate and distinct acts. The defendant committed the offense of burglary when he knowingly entered the Ruehle residence by climbing through a window, with the intent to steal (Ill. Rev. Stat. 1971, ch. 38, par. 19-1). It was only after he had completed the burglary and had discovered the presence of Mrs. Ruehle that he committed an armed robbery by taking property from her by threatening the imminent use of force, while armed with a dangerous weapon; to-wit a knife. (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) Thus, this is not a situation where a single act of the defendant constituted multiple offenses, and therefore Lilly is inapplicable.

Rather, we believe that the test utilized by the court in People v. Williams (1975), 60 Ill. 2d 1, 322 N. E. 2d 819, is determinative of the issue. In Williams, the defendant and an accomplice, feigning car trouble, gained entry to the Calderone residence and immediately killed Mr. Calderone who had opened the front door while carrying an unloaded revolver. The defendant and his accomplice then pointed the weapon at



Mrs. Calderone demanding money. The defendant was convicted of burglary, armed robbery, and murder, and was sentenced for each offense. The Supreme Court reversed the conviction and sentence for burglary since the "unauthorized entry with the intent to commit theft and the actual theft by means of armed robbery constituted two offenses arising from the same conduct." (60 Ill. 2d 1, 14.) The court found that in Williams, the defendant had full knowledge that the Calderones were within the dwelling and that the defendant had entered the dwelling for the purpose of committing an armed robbery. However, the court next considered the propriety of separate convictions and sentences for armed robbery and murder. Again, looking to the purpose or objective of the defendants, the court held that separate convictions for armed robbery and murder were proper "even though the activity constituting both offenses was a series of very closely related acts." In so ruling, the court, at page 14, stated:

"* * * The purpose of the entry was robbery, not murder, and that objective changed to murder only when the robbers were confronted by Mr. Calderone with a gun in his hand. Then, they chose to commit a separate act for the purpose of killing Mr. Calderone. That shooting can be viewed as a means of removing an obstacle to their original objective of robbery, but it is also evident that at least part of their reason for killing was to avoid injury or apprehension by Mr. Calderone. We believe that such a situation is controlled by our decision in People v. Johnson (1970), 44 Ill. 2d 463, in which we held that the convictions and sentences for burglary and rape were proper. As we stated in Johnson, cases such as Schlenger were not intended to cover situations in which more than one offense arises from a



series of closely related acts and the crimes are clearly distinct and require different elements of proof'. (44 Ill. 2d at 475; see also People v. Raby (1968), 40 Ill. 2d 392; People v. Harper (1972), 50 Ill. 2d 296.) * * *."

In the case at bar, the purpose of burglary was theft, not armed robbery. There is no evidence that the defendant or his accomplices had knowledge of Mrs. Ruehle's presence prior to the burglary. It was only after the defendant had discovered the presence of Mrs. Ruehle that his objective or purpose changed from theft to armed robbery. As in the Williams case, the defendant's acts of threatening the victim with a knife and binding and gagging her was motivated, at least in part, by a desire to avoid apprehension and to prevent her from leaving her home and from notifying police that a burglary was being committed. As in the armed robbery - murder situation presented in the Williams case, the objective of the defendant changed upon discovering Mrs. Ruehle within the premises, and he then chose to commit a separate act justifying a separate judgment of conviction. It should be noted that here only one sentence was given on the two counts.

See also People v. Johnson (1970), 44 Ill. 2d 463, 475, 256 N. E. 2d 343; People v. Harper (1972), 50 Ill. 2d 296, 302, 278 N. E. 2d 771; People v. Moore (1972), 51 Ill. 2d 79, 87, 88, 281 N. E. 2d 294; People v. Scott (1974), 57 Ill. 2d 353, 356, 312 N. E. 2d 596; and People v. Burks (1975), Ill. App. 3d , N. E. 2d , 73-389, involving this same incident.

We therefore conclude that the conduct which constituted the armed robbery was independently motivated and sufficiently separate and distinct from the conduct which formed the



basis for the burglary conviction to justify convictions on both counts. We therefore affirm the judgment.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.



UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:-----



FILED
 JUL 2 - 1975
 LOREN J. STROTZ, Clerk
 Appellate Court, 2nd District

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND JUDICIAL DISTRICT
 FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	THE EIGHTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	DUPAGE COUNTY,
	)	ILLINOIS.
MICHAEL T. SEYMOUR,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

Following a jury trial, the defendant, Michael T. Seymour, was convicted of unlawful possession and unlawful delivery of more than 500 grams of cannabis. While awaiting sentencing, he absented himself from the State and forfeited his bond. Upon his return to the State, the defendant was sentenced to a term of five to fifteen years imprisonment. On appeal, the defendant contends that the State failed to establish that a delivery had been made, and that consequently, an unlawful delivery of cannabis was not proven beyond a reasonable doubt. The defendant also contends that the trial court erroneously instructed the jury in refusing two instructions tendered by the defendant, and that the sentence imposed exceeds the maximum sentence prescribed by law.

Having considered these issues, we conclude that the defendant was proven guilty beyond a reasonable doubt, and that there was no error in refusing to give the instructions tendered by the defendant. However, the sentence imposed on the defendant exceeds the maximum sentence prescribed by law at the time the offense was committed and the prosecution was commenced. We therefore affirm the judgment of conviction as modified.

The defendant and four other persons, who were tried separately, were indicted for unlawful delivery and unlawful possession of cannabis in excess of 500 grams in violation of the Cannabis Control Act. (Ill. Rev. Stat. 1971, ch. 56 1/2, par. 704(e), 705(e).) At the trial by jury, the facts surrounding the commission of the offenses were undisputed.

Joseph Grady, a special agent for the Illinois Bureau of Investigation, testified that he and two other agents, John Gulley and Joseph Gryz, while posing as persons interested in purchasing a large quantity of marijuana, established contact with James McMullin and Daniel Kreger on October 15, 1971. Kreger and McMullin indicated that they were acquainted with a person who could obtain large quantities of marijuana. Subsequently, Kreger and McMullin introduced the agents to Michael T. Seymour, the defendant. Upon meeting the agents, Seymour asked the undercover agents to show him their money. After ascertaining that the agents had approximately \$3000, Seymour stated that he would arrange to take them to the location of the marijuana.

The group proceeded to a business district where Seymour told the agents to wait in their vehicle. The defendant returned to the vehicle with Robert Palakie, whom Seymour introduced indicating that McMullin, Kreger, and himself were middle-men in the operation. Thereafter, Seymour, Palakie, and the agents left that location and drove to a residential dwelling in West Chicago. Again the agents were instructed to remain in their vehicle, while Seymour and Palakie entered the house. A short time later, Seymour returned to the vehicle and stated that only two prospective purchasers could enter the premises. Agents Grady and Gulley entered the house where they were introduced

to Michael Grames.

Seymour stated that there were approximately eighty pounds of marijuana for sale at \$130 a pound. During the negotiations, Seymour stated that he could not reduce the price per pound because other persons, including Kreger, McMullin, and himself were to receive a specific amount per pound from this transaction. An agreement was made for an initial twenty-five pounds at \$125 a pound on the condition that Gulley, Grady, and Gryz purchase the remainder of the cannabis at a future date.

After the negotiations concluded, Grady, Gulley, Seymour, and Palakie returned to the vehicle and informed Agent Gryz of the agreement. At this time, Gryz was allowed to enter the premises in order to examine the quality of the substance being purchased. As they returned to the house, Seymour told Grady that future transactions should be conducted on the basis of mutual trust.

After re-entering the house, Seymour suggested that the agents transfer the money while inside the building. The undercover agents objected to this arrangement and expressed their view that the exchange take place at a location where they could have immediate possession of the cannabis. The purchasers and sellers then agreed to exchange the money for the marijuana outside the house. Seymour carried a large green plastic bag containing the marijuana to the agents' vehicle, placed it on the ground adjacent the trunk of the vehicle, and asked Grady for \$3,125. At this point, the agents announced their identity and informed Seymour and Palakie that they were under arrest. After a brief struggle, which was initiated by the defendant, he was taken into custody.

The testimony of Agent Grady was corroborated by



to Michael Grames.

Seymour stated that there were approximately eighty pounds of marijuana for sale at \$130 a pound. During the negotiations, Seymour stated that he could not reduce the price per pound because other persons, including Kreger, McMullin, and himself were to receive a specific amount per pound from this transaction. An agreement was made for an initial twenty-five pounds at \$125 a pound on the condition that Gulley, Grady, and Gryz purchase the remainder of the cannabis at a future date.

After the negotiations concluded, Grady, Gulley, Seymour, and Palakie returned to the vehicle and informed Agent Gryz of the agreement. At this time, Gryz was allowed to enter the premises in order to examine the quality of the substance being purchased. As they returned to the house, Seymour told Grady that future transactions should be conducted on the basis of mutual trust.

After re-entering the house, Seymour suggested that the agents transfer the money while inside the building. The undercover agents objected to this arrangement and expressed their view that the exchange take place at a location where they could have immediate possession of the cannabis. The purchasers and sellers then agreed to exchange the money for the marijuana outside the house. Seymour carried a large green plastic bag containing the marijuana to the agents' vehicle, placed it on the ground adjacent the trunk of the vehicle, and asked Grady for \$3,125. At this point, the agents announced their identity and informed Seymour and Palakie that they were under arrest. After a brief struggle, which was initiated by the defendant, he was taken into custody.

The testimony of Agent Grady was corroborated by

Agents Gulley and Gryz. Defense counsel stipulated to the nature of the substance as cannabis, and further stipulated that the weight of the cannabis exceeded 500 grams. In response to defense counsel's questions during cross-examination, the witnesses consistently denied that Michael Seymour was a special employee of the I.B.I., and further denied that he was cognizant of their identity as undercover agents.

At the close of the State's case, defense counsel presented his opening statement to the jury, in which he argued that the defendant was aware of the agents identity and was merely attempting to aid them in the apprehension of marijuana dealers. The State's Attorney objected to these comments, and the court ruled that such comments were improper in an opening statement. At this point, the defense rested its case, and proceeded to closing argument.

The jury found the defendant guilty of possession of cannabis in excess of 500 grams and of delivery of cannabis in excess of 500 grams. A presentence report was ordered. However, before the sentencing hearing the defendant left the State and his bond was forfeited. Upon his return to the State of Illinois, he was sentenced to a term of five to fifteen years imprisonment.

On appeal, the defendant contends that the evidence failed to establish beyond a reasonable doubt that a delivery of cannabis was made by the defendant. In support of this contention, the defendant asserts that he was arrested before any transfer of possession or attempt to transfer possession of the cannabis. Consequently, the defendant argues that the State failed to prove an element essential to the offense of unlawful delivery of cannabis.

Delivery is defined by statute as "the actual, constructive or attempted transfer of possession of cannabis, with or without consideration, whether or not there is an agency relationship." (Ill. Rev. Stat. 1971, ch. 56 1/2, par. 703(c).) Thus, an unlawful delivery of cannabis, as defined by statute, includes not only the completed transfer of possession, but also an attempted transfer of possession. In the case at bar, the jury was instructed on the statutory definition of delivery of cannabis, and whether the defendant's actions constituted a delivery of cannabis was a question of fact, which was properly submitted to the jury.

It is well established that a jury's finding of fact will not be disturbed unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of guilt. (People v. Galloway (1963), 28 Ill. 2d 355, 358, 192 N. E. 2d 370; People v. Stringer (1972), 52 Ill. 2d 564, 568, 289 N. E. 2d 631.) The undisputed testimony of the agents established that the defendant carried a large green plastic bag containing more than 500 grams of marijuana to the agents' vehicle, placed it on the ground adjacent to the vehicle, and demanded \$3,125 in return. Certainly, the jury could have determined that these actions of the defendant constituted a delivery of cannabis as defined by the statute. The fact that the defendant was arrested before the money was exchanged is immaterial under the statutory definition of delivery of cannabis. Moreover, the fact that the defendant had not transferred exclusive possession of the marijuana to the agents at the time the arrest was effectuated is not contrary to the jury's finding that a delivery had occurred under the statutory definition of delivery of cannabis. Consequently, we find that the evidence is not contrary to verdict. Nor does the evidence create a reasonable doubt of guilt. We therefore will not



disturb the jury's finding of fact that the defendant's actions constituted a delivery of cannabis.

Next, the defendant argues that the court erred in refusing to give two of the defendant's tendered instructions. Neither of these instructions are found in Illinois Pattern Jury Instructions. The first instruction which defendant asserts was erroneously refused by the court stated:

"Michael Seymour contends that as to both counts of the indictment, he did not have the intent to commit the offenses which the law requires to warrant his conviction. He contends that the evidence introduced in the case is consistent with his having done the acts testified to by the agents, with the purpose of assisting the agents in bringing about the detection and apprehension of persons engaged in violations of the law, rather than having performed such acts with the purpose of violating the law himself.

It is not necessary for a defendant to establish a reasonable doubt by any particular degree of proof; rather, it is sufficient to require his acquittal if, upon your consideration of the evidence you have a reasonable doubt that the defendant acted with the purpose of violating the law. That reasonable doubt may be founded upon evidence introduced during the trial, or upon the failure of the state to introduce evidence from which you may infer a criminal intent. In either event, should you have a reasonable doubt as to the purpose and intent with which the defendant acted, you must find him not guilty."

In refusing to give this instruction, the trial court found that it was argumentative in nature and lacked brevity. We agree.

Supreme Court Rule 451 (Ill. Rev. Stat. ch. 110A, par. 451) states that instructions should be simple, brief, impartial, and free from argument. The first paragraph of this instruction is far from impartial and free from argument in asserting the defendant's contention that he was acting with the purpose of assisting agents in the apprehension of criminals. Certainly, this instruction was argumentative in nature and was properly refused by the trial court.

Moreover, there was no affirmative evidence adduced at trial to substantiate this instruction. Indeed, the only evidence of the defendant's contention that he acted to aid the agents in the apprehension of the primary marijuana dealers consisted of the agents' denial of this contention during cross-examination. Although defense counsel argued this theory during his opening statement and closing argument, he failed to introduce any evidence whatsoever to support this theory of defense.

While the defendant is entitled to have the jury instructed on the law applicable to a particular set of facts which the jury might find to have been proven by the evidence, even if there is only slight evidence relating to defendant's theory of the case (People v. Sweeney (1969), 114 Ill. App. 2d 81, 89, 251 N. E. 2d 897; People v. Keating (1971), 2 Ill. App. 3d 884, 889, 270 N. E. 2d 164; People v. Kalpak (1957), 10 Ill. 2d 411, 424, 425, 140 N. E. 2d 726; People v. Kucala (1972), 7 Ill. App. 3d 1029, 1035, 288 N. E. 2d 622), in the case at bar, there was no evidence at all supporting the defendant's theory.

The second paragraph of this instruction was not

tendered separately. Rather, it was tendered in conjunction with the first paragraph as one entire instruction, and it was properly refused based upon the argumentative nature of the first paragraph of this instruction. However, we note that the second paragraph of this instruction was improper as well in attempting to state factors which give rise to reasonable doubt. Illinois Pattern Jury Instructions does not contain a definition of reasonable doubt. Rather, the Committee recommends that no instruction be given defining reasonable doubt. (See Ill. Pattern Jury Inst. - Criminal, No. 2.05 (1968.) Thus, the second paragraph of this instruction was properly refused.

The second instruction which the defendant asserts was erroneously refused by the trial court stated:

"The Court instructs the jury that before a defendant may be convicted of an offense, the jury must be satisfied beyond a reasonable doubt, that the defendant in acting, as he did, acted with an intent to violate the law, that is, a defendant may not be convicted if his intent was innocent rather than evil."

This instruction was objected to as mixing the issues of intent and motive. The State is not required to prove motive, which is defined as that which prompts a person to act. (I.P.I. - Criminal 3.04.)

This instruction, in mixing the issues of intent and motive, erroneously implies that the State must prove beyond a reasonable doubt that the defendant was motivated to act unlawfully. Since the State is not required to prove motive and since there was no evidence introduced regarding the defendant's motive, this instruction was properly refused.

In addition, we note that Illinois Pattern Instruction (Criminal) 2.03, which instructs the jury of the presumption of

the defendant's innocence and of the State's burden of proving the defendant guilty beyond a reasonable doubt, had been given. Moreover, the jury had been instructed on the propositions the State must prove to sustain the charges of unlawful delivery and unlawful possession of cannabis. The jury was instructed that if they found from their consideration of all the evidence that these propositions had not been proven beyond a reasonable doubt, then they must find the defendant not guilty. In view of these instructions and the testimony adduced at trial, it does not appear that the verdict was the result of the court's refusal to give the defendant's tendered instructions. (See People v. Manzella (1974), 56 Ill. 2d 187, 200, 306 N. E. 2d 16, 22; People v. Farnsley (1973), 53 Ill. 2d 537, 546, 293 N. E. 2d 600.) Consequently, any error in refusing to give these instructions was harmless error at most, and was not so prejudicial as to warrant a reversal.

The final contention of the defendant is that the sentence imposed by the trial court must be reduced. The court in sentencing the defendant to a term of five to fifteen years imprisonment expressly referred to the Unified Code of Corrections, which had become effective prior the sentencing hearing held in November, 1973. Under the Unified Code of Corrections, the maximum penalty for unlawful delivery of cannabis in excess of 500 grams (a Class 2 felony) ranges from one to twenty years (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(3)). However, in the case at bar, the offense was committed and the prosecution was commenced under Ill. Rev. Stat. 1971, ch. 56 1/2, par. 705(e), prior to the effective date of the Unified Code of Corrections. Under this statute, the maximum penalty prescribed by law for

unlawful delivery of cannabis in excess of 500 grams is one to seven years imprisonment for first offenders and two to ten years imprisonment for subsequent offenders. Since the sentence prescribed by the Code is greater than the sentence under the law upon which the prosecution was commenced, the provisions of the Unified Code of Corrections should not have been applied in the case at bar. (Ill. Rev. Stat. 1973, ch. 38, par. 1008-2-4; People v. Brooks (1973), 13 Ill. App. 3d 1003, 1008, 301 N. E. 2d 496.) Consequently, the maximum sentence imposed on the defendant must be reduced to conform with the sentencing provisions of Ill. Rev. Stat. 1971, ch. 56 1/2, par. 705(e), under which the defendant was prosecuted. Since the record discloses that the defendant is a subsequent offender, the maximum sentence is reduced from fifteen to ten years.

The record discloses that the defendant had made substantial progress toward rehabilitation during the interim between the trial and the sentencing hearing. He had sought help at a private drug rehabilitation program, which is recognized by state authorities, had undergone psychiatric care at a Veterans Administration Hospital, had successfully refused drugs himself, and had been active in rehabilitating others in the drug rehabilitation program. Moreover, while recognizing that the defendant had made substantial progress toward rehabilitation, the court in sentencing the defendant emphasized the fact that the defendant had left the state of Illinois after the trial and had failed to appear in court for sentencing on the appointed date. However, for this, the defendant's bond had been forfeited.

From our review of the record, including the pre-sentencing hearing, we conclude that the sentence as imposed by the trial

court is excessive. Consequently, under Supreme Court Rule 615(b)(4), the sentence is reduced to three to ten years imprisonment. We therefore affirm the judgment of conviction as modified.

JUDGMENT AFFIRMED AS MODIFIED.

SEIDENFELD, P.J., and GUILD, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 11, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED
1st DIVISION

JUL 11 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

IN THE INTEREST OF)
JEFFREY DURBIN,) Appeal from the 16th Judicial Circuit,
a minor child) Kane County, Illinois.
(Viola Davis, Appellant))

MR. JUSTICE GUILD delivered the opinion of this court:

This is a dependency proceeding involving Jeffrey Durbin, a minor, who was born on December 14, 1962. The following month the father died. On September 30, 1963, when the child was nine months old, a petition for dependency was filed. Various orders were entered in that proceeding and the child has been supported since that time by the County of Kane. Apparently the mother of the child, the petitioner herein, is without funds and her present husband was unemployed at the time of the filing of the petition herein, the subject of this proceeding.

On November 27, 1974 a supplemental petition was filed and on December 17, 1974 an order was entered which authorized the guardian to consent to the adoption of the minor child. On December 17, 1974 the judge stated that he had to consider the minor's best interest and that the mother should consent to the adoption. The mother, however, did not consent to the adoption and this appeal followed. The record is incomplete and shows no hearing having been held as to the merits or any evidence entered.

The appellee has filed a notice with this court, which we have considered as a motion, in which the People state that they



will waive the filing of a brief and have consented to have the matter heard pro forma. Since the People have not filed briefs as required under Supreme Court Rule 341, 343(a) (Ill.Rev.Stat. 1973, Ch. 110A, ¶341, 343(a)), and have not appeared to support the judgment in its favor and do not oppose the prayer for reversal, we find in the exercise of our discretion, that the circumstances do not call upon us to rule on the merits to prevent injustice. (King v. King 1974, 24 Ill.App.3d 222, 321 N.E.2d 80; Budget Rent-A-Car v. Kirk (1974), 19 Ill.App.3d 576, 312 N.E.2d 19.) We, therefore, summarily reverse the judgment of the circuit court of Kane County authorizing the adoption of the minor herein.

REVERSED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Respondent-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
ALFRED ARMSTRONG,	)	HONORABLE
	)	SHELDON BROWN
Petitioner-Appellant.	)	PRESIDING.

Mr. JUSTICE SIMON delivered the opinion of the court:

Petitioner, Alfred Armstrong, was found guilty by a jury of armed robbery. He was sentenced to a term of not less than 15 years nor more than 20 years, and his conviction was affirmed on appeal. (People v. Armstrong (1970), 127 Ill. App. 2d 457, 262 N. E. 2d 354 (petition for leave to appeal denied, 44 Ill. 2d 587, cert. denied, 403 U. S. 935).) The facts leading to the trial, conviction, and sentencing of petitioner for armed robbery are set forth in the opinion of the appellate court.

On direct appeal, petitioner contended that he was denied due process of law by being prosecuted and convicted twice for the same conduct; that the trial court erred when it denied his pretrial motion to prohibit the State's use of a prior murder conviction for impeachment purposes (People v. Armstrong (1968), 41 Ill. 2d 390, 243 N. E. 2d 825), that the trial court erred in refusing one of petitioner's tendered jury instructions, that the sentence imposed was excessive, and that he was denied adequate representation by counsel. People v. Armstrong (1970), 127 Ill. App. 2d 457, 459, 262 N. E. 2d 354.

Petitioner filed a pro se petition under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq). Counsel was then appointed for him, and an amended post-conviction petition was filed. At a hearing before the same judge who tried the case, the amended petition was dismissed on the State's motion without an evidentiary hearing.

Petitioner alleged in the amended petition that he was taken into custody and unlawfully detained by police officers of the Chicago Police

Department on April 20, 1966; that said officers did not have an arrest warrant, that petitioner had not committed a crime in their presence, and that there was no probable cause to believe that petitioner had committed any crime; that after being taken into custody petitioner was taken to a police station and handcuffed to a chair; that petitioner inquired as to why he was in custody and repeatedly requested that he be permitted to make a telephone call and to contact an attorney, but he was refused; that while in custody petitioner was questioned relative to his involvement in various crimes, but at no time was he permitted to consult with an attorney, or to have an attorney present.

Petitioner further alleged in the amended petition that he was forced to appear in a lineup along with other persons of various descriptions, weight, sizes and complexions, but was not permitted to have an attorney present; that the lineup was unnecessarily suggestive and conducive to irreparable mistaken identification, so that petitioner was denied due process of law; that petitioner was not identified by any of the numerous persons who viewed the lineup until after an unknown police officer persuaded one of the viewers, who had originally picked out another person, to change his mind, and to point out petitioner; that the identification of petitioner by the various witnesses was a product of an unlawful detention and, therefore, was not properly admissible in evidence against him; and that all such identifications, including the in-court identification, were directly traceable to the unlawful detention of petitioner.

Petitioner in appealing the order dismissing his amended petition contends: first, that he was deprived of due process by the failure of the State to comply with his request for counsel at a lineup; second, that he was unlawfully detained and that his identification by witnesses who appeared at the trial was the consequence of his unlawful detention; third, that he was the victim of suggestive pretrial identification procedures; and finally that fundamental fairness requires this court to conclude that none of petitioner's

claims were waived and that notwithstanding his prior appeal to this court the doctrine of res judicata is not applicable to them.

In contending that his right to due process of law was infringed by the failure of the State to permit petitioner to have counsel present at the lineup, petitioner relies on People v. Burbank (1972), 53 Ill. 2d 261, 291 N.E. 2d 161. However, in that case, the court held that the right to counsel at the time of a lineup does not apply to a pre-indictment lineup. (53 Ill. 2d at 271.) See also Kirby v. Illinois (1972), 406 U.S. 682 and People v. Riggs (1973), 14 Ill. App. 3d 1033, 303 N.E. 2d 802. The lineup at which petitioner was not represented by counsel was conducted 9 days prior to his indictment.

In arguing that his identification by witnesses was a product of unlawful detention, petitioner first contends that the State by moving to dismiss his petition admitted the truth of the allegation that petitioner was taken into custody when there was no probable cause to believe that the petitioner had committed any crime. The motion to dismiss the post-conviction petition admits as true only those allegations of fact properly pleaded and not mere conclusions of the pleader. (People v. Hysell (1971), 48 Ill. 2d 522, 272 N.E. 2d 38; People v. Olson (1970), 46 Ill. 2d 167, 169, 263 N.E. 2d 92; People v. Smith (1970), 44 Ill. 2d 272, 275, 255 N.E. 2d 450; People v. Sadeghzadeh (1974), 17 Ill. App. 3d 601, 308 N.E. 2d 304; People v. Payne (1973), 16 Ill. App. 3d 83, 305 N.E. 2d 700; People v. Funches (1972), 9 Ill. App. 3d 372, 292 N.E. 2d 187.) The allegation that when he was taken into custody there was no "probable cause to believe that the petitioner had committed any crime" is a conclusion and is not admitted by the motion to dismiss it. The petition, therefore, fails to set forth factual allegations sufficient to establish that the petitioner was taken into custody in violation of his constitutional right to be safe from unlawful arrest.

In addition, petitioner has waived this argument by failing to raise it in either the trial court or on direct appeal. Matters which could have been raised at trial or on direct appeal from a judgment of conviction but were not



raised are barred from consideration in a post-conviction hearing by the doctrines of res judicata and waiver. (People v. Derengowski (1970), 44 Ill. 2d 476, 256 N.E. 2d 455; People v. Somerville (1969), 42 Ill. 2d 1, 245 N.E. 2d 461; People v. Ashley (1966), 34 Ill. 2d 402, 216 N.E. 2d 126; People v. Smith (1974), 17 Ill. App. 3d 494, 308 N.E. 2d 257; People v. Riggs (1973), 14 Ill. App. 3d 1033, 303 N.E. 2d 802.) However, this rule is relaxed where required by fundamental fairness. (People v. Mamolella (1969), 42 Ill. 2d 69, 245 N.E. 2d 485.) Thus, where the principle asserted for the first time as a basis for post-conviction relief was not recognized prior to direct appeal, and consequently could not have been raised earlier, res judicata and waiver do not apply. (People v. Ikerd (1970), 47 Ill. 2d 211, 265 N.E. 2d 120.) Although unsupported by facts in the amended petition, petitioner argues in his brief that this case falls within the exception. He contends that People v. Bean (1970), 121 Ill. App. 2d 332, 257 N.E. 2d 562, which held that where the identification of a defendant is the consequence of the unlawful seizing of his person, evidence of that and subsequent identifications are inadmissible against him at trial, was not decided until after the direct appeal. However, petitioner could have moved to suppress the identification at trial on the authority of People v. Albea (1954), 2 Ill. 2d 317, 118 N.E. 2d 277, which held that where evidence would not have been obtained but for an illegal search and seizure, it is inadmissible. In that case, the material witness against the defendant was discovered only as a result of an illegal search. The court held that the witness and all her testimony were incompetent. Petitioner also had the opportunity to raise the issue on appeal with the additional support of Davis v. Mississippi (1969), 394 U. S. 721. This case was decided almost a year before the appellate court heard oral argument. Because of the availability of this argument to petitioner in both the trial and the appellate court, he may not now raise the issue for the first time in his post-conviction petition. Neither the pro se petition nor the amended petition allege any facts that explain or excuse this failure. Consequently, the issue was waived.



Similarly, petitioner's contention that he was subjected to suggestive pretrial identification procedures could have been presented at trial and then on direct appeal; since petitioner failed to raise an objection available to him, it cannot, on the basis of the authorities cited above, be considered now. Moreover, the allegations of the amended petition are insufficient to negate the existence of in-court identification untainted by the allegedly improper pretrial identification procedures. The relevant allegations of the amended petition relating to identification of the petitioner read as follows:

"Paragraph 4. * * * The petitioner was not identified by any of the numerous persons who viewed the line-up, until after an unknown police officer persuaded one of the viewers, who had originally picked out a Freddie Adams to change his mind, and to point out the petitioner.

"Paragraph 5. The identification of the petitioner by all of the witnesses that appeared at his trial, was the direct consequence of an unlawful detention of the defendant's person, and contrary to the law - *People v. Bean*, 257 N.E.2d, 561.

"Paragraph 6. Defendant's identification by the various witnesses, was a product of an unlawful detention and, therefore, was not properly admissible [sic] in evidence against him, and relies [sic] upon *Davis v. Mississippi*, 394 US 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969), and *People v. Albea*, 2 Ill.2d 317, 118 N.E.2d 277, 41 A.L.R.2d 895 (1954)."

The only allegation which can be regarded as based on factual assertions rather than conclusions states that "one of the viewers" was persuaded "to point out the petitioner." From that allegation the amended petition jumps to the conclusion, without any factual allegations to support it, that the improper suggestion to one of the viewers tainted the in-court identification by other witnesses. An in-court identification is admissible where "its origin was independent of any allegedly suggestive pretrial confrontation." (*People v. Stringer* (1972), 52 Ill.2d 564, 568, 289 N.E.2d 631; *People v. Moore* (1974), 17 Ill.App.3d 507, 308 N.E.2d 210.) The petition is inadequate in that it fails to allege facts, as distinguished from conclusions, showing that there was no independent and untainted source or basis for the in-court identification by witnesses other than the one the amended petition alleges picked out another person and then was induced to change his mind. Because of this omission,

the petitioner has failed to meet his burden of showing the violation of a substantial constitutional right. People v. Moore (1974), 17 Ill. App. 3d 507, 509, 303 N. E. 2d 210.

Although he does not allege it in his amended petition, petitioner argues in his brief that the failure to raise the objection of improperly suggestive pre-trial identification procedures resulted from inadequate representation by counsel at his trial and perhaps on direct appeal. In People v. Westbrook (1972), 5 Ill. App. 3d 970, 284 N. E. 2d 695, petitioner contended he was denied the effective assistance of counsel at trial, but the court held that an evidentiary hearing was not necessary where no affidavits, records, or other evidence were filed in support of the petition. In this appeal, not only is the amended petition for post-conviction relief unsupported by affidavits, records, or other evidence showing that petitioner was deprived of effective assistance of counsel, but such deprivation is not even alleged.

Finally, petitioner argues that the doctrines of res judicata and waiver should be relaxed because "petitioner must be assumed to have had a valid and true claim," yet through misfortune, the claim was never raised. Petitioner relies on People v. Ikerd (1970), 47 Ill. 2d 211, 265 N. E. 2d 120, where the right relied on was recognized for the first time after the direct appeal. Petitioner does not allege that the "claims" he now presents were unknown at the time of trial, but argues that they were not raised on direct appeal because of alleged incompetency of counsel or other misfortunes referred to in the brief, but not set forth in the amended petition. Such a contention does not properly present a constitutional claim under the Post-Conviction Hearing Act.

An examination of the record in this case, therefore, discloses no fundamental unfairness or any special circumstances to justify the relaxation of the doctrines of res judicata or waiver. (People v. Bracey (1972), 8 Ill. App. 3d 119, 121, 289 N. E. 2d 241; People v. Adams (1972), 52 Ill. 2d 224,

226, 287 N.E. 2d 695; People v. Henderson (1968), 39 Ill. 2d 342, 345, 235 N.E. 2d 580.) The trial court properly dismissed the amended post-conviction petition without an evidentiary hearing.

The judgment of the trial court is affirmed.

AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

(Abstract only.)



30
291.A. 1031



59801

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
SYLVESTER HAROLD PHILLIPS,	)	HON. JOHN J. LAMPERIS
	)	Presiding
Defendant-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Goldberg and Simon, JJ.

Sylvester Harold Phillips, defendant, was found guilty after a bench trial for the crime of possession of marijuana (Ill. Rev. Stat. 1971, ch. 56 1/2, par. 704). He was sentenced to a term of 30 days in the House of Correction. Defendant appeals arguing: (1) that the evidence was insufficient to establish his guilt beyond a reasonable doubt since he was never shown to be in immediate and exclusive possession of the substance recovered by the police; (2) that the evidence failed to establish that the substance was marijuana; and (3) that he did not knowingly and understandingly waive his right to a trial by jury.

At trial David Kelly, a lieutenant with the Evanston Police Department, testified that on May 13, 1972, at approximately 2:30 A.M. he observed the defendant driving a car northbound on Custer Avenue. There was a loud noise coming from a defective muffler and excessive emission of smoke from defendant's vehicle. Lieutenant Kelly testified that he stopped the defendant at approximately 413 Custer Avenue. He approached defendant's vehicle and informed the defendant why he had been stopped. As defendant opened the car door, Lieutenant Kelly detected a strong odor of marijuana. Lieutenant Kelly testified that he recognized the odor of marijuana because in his 15 years as a police officer, he had smelled it on prior occasions. Defendant got out of his vehicle and walked to the rear of the vehicle. Defendant then walked to the passenger's side where he stood while Lieutenant Kelly shined his flashlight into the car.

Seated in the front seat of the vehicle was a young female and in the rear seat were two males. The window on the passenger's side of the vehicle was up and the door was in a locked position.

Lieutenant Kelly testified that at that time he observed the defendant emptying his pockets. Lieutenant Kelly then walked around to the passenger's side of the vehicle and placed the defendant under arrest. Defendant was escorted back to the squad car and placed in the rear seat. Lieutenant Kelly then returned to the passenger's side of the vehicle where he had seen the defendant empty his pockets and found lying on the ground three small manila envelopes. The envelopes were inventoried and sent to the Chicago Crime Laboratory for analysis.

In open court Lieutenant Kelly opened a sealed envelope from the Chicago Police Department Crime Laboratory. Inside the envelope were two sheets of paper and another envelope. One sheet of paper was a receipt for the exhibits with a time stamp of May 17, 1972. The second sheet was a laboratory report dated May 19, 1972, case no. T10381, signed by Chicago police chemist Veronica Drantz. The laboratory report stated that on May 17, 1972, Officer K. Hile of the Evanston Police Department submitted the following exhibit to the laboratory for examination: Exhibit Q-1, Q-2 and Q-3, three small manila envelopes containing crushed green plant and seeds, all tested and subject to chemical analysis which found that they were cannabis sativa, commonly referred to as marijuana.

That report identified the envelope which was a sealed plastic envelope submitted by the Evanston Police Department which had been sealed at the time it was submitted and had since then been reopened and resealed. Lieutenant Kelly identified the plastic envelope which he had taken from the first envelope which had written on it the defendant's name, address and the date, time and location of the arrest. Lieutenant Kelly identified this envelope as having seen it at the youth division of the Evanston Police Department on May 13, 1972, at 2:10 A.M. after placing defendant



under arrest. Inside the plastic envelope was a manila evidence envelope used by the Evanston Police Department for narcotics cases. Lieutenant Kelly opened the manila envelope and inside found three small manila envelopes which Lieutenant Kelly identified as the envelopes he found lying on the ground where defendant was placed under arrest. Lieutenant Kelly testified that the three manila envelopes were in the same condition except that there had been a writing designating each of them as Q-1, Q-2 and Q-3.

Torbin Nielsen, a police officer for the Evanston Police Department, testified that on May 13, 1972, at approximately 2:30 A.M. in the 400 block of Custer Avenue, he responded to Lieutenant Kelly's call. He observed Lieutenant Kelly place the defendant under arrest. Lieutenant Kelly then walked back to where defendant had been standing and recovered three bags lying on the ground.

Sylvester Phillips, defendant, testified that on May 13, 1972, at approximately 2:30 A.M., he was returning home after eating when he was stopped by Lieutenant Kelly. After exiting from his car, defendant was standing next to the car when he was placed under arrest by Lieutenant Kelly. Defendant denied that he was emptying his pockets and stated that he was merely looking for his wallet. Defendant stated that there was a smell in the car but that no one had been smoking marijuana at the time he was placed under arrest.

Dorothy L. Jones, the defendant's niece, testified that she was with the defendant at the time he was stopped by Lieutenant Kelly. She stated that she was facing the front of the car and did not observe the defendant drop anything from his pockets.

Defendant's first contention is that the evidence was insufficient to establish beyond a reasonable doubt that he was in immediate and exclusive control of the substance recovered by the police. It is a well established rule that the commission of an offense may be established by entirely circumstantial evidence if all the evidence taken together satisfied the trier of fact beyond a

reasonable doubt of defendant's guilt. (People v. Marino, 44 Ill. 2d 562, 256 N.E.2d 770.) The fact that the circumstantial evidence relied upon must not give rise to any reasonable hypothesis of innocence does not mean that the trier of fact is required to search out potential explanations compatible with innocence and elevate them from the status of reasonable doubt. People v. Arndt, 50 Ill. 2d 390, 280 N.E.2d 230.

In the case at bar, Lieutenant Kelly testified that after stopping defendant's car for a traffic violation, he detected the odor of marijuana emanating from the car. While Lieutenant Kelly was looking into the car with his flashlight, defendant walked over to the passenger's side of the vehicle. The doors and windows of the car on the passenger's side were locked. At that time Lieutenant Kelly observed the defendant emptying his pockets. Defendant was then placed under arrest and put into the squad car. Lieutenant Kelly immediately went back to the area where defendant had been standing and recovered three small manila envelopes. The logical and reasonable inference from this testimony is that the envelopes found on the ground where defendant had been standing at the time Lieutenant Kelly observed him emptying his pockets were the objects that had been dropped by the defendant. This evidence was sufficient to establish that defendant possessed the envelopes in question. People v. Miles, 13 Ill. App. 3d 453, 300 N.E.2d 822; People v. Johnson, 21 Ill. App. 3d 769, 315 N.E.2d 579; People v. Gist, 5 Ill. App. 3d 1047, 284 N.E.2d 701.

Defendant's next contention is that the evidence failed to establish that the substances seized were marijuana. Defendant argues that the State failed to establish an unbroken chain of custody and that Lieutenant Kelly's testimony as to the delivery, condition of the substance, and laboratory analysis thereof, was incompetent hearsay testimony. Lieutenant Kelly testified that after he arrested the defendant he recovered three small manila envelopes from where defendant had been standing. He inventoried

the envelopes and sent them to the Chicago Police Crime Laboratory for analysis. In court, Lieutenant Kelly opened a sealed envelope from the Chicago Police Department's Crime Laboratory. Inside that envelope he found a receipt for the exhibits, a laboratory report and an envelope. The laboratory report stated that on May 17, 1972, Officer K. Hile of the Evanston Police Department submitted three small manila envelopes containing a crushed green plant marked Q-1, Q-2 and Q-3 for analysis. An analysis revealed that the envelope contained cannabis sativa, commonly referred to as marijuana. The report was signed by Chicago police chemist Veronica Drantz and approved by the Director of the Criminalistics Division. Lieutenant Kelly identified the plastic envelope as one that he had seen at the Evanston Police Department on May 13, 1972, immediately after defendant's arrest. Written on the outside of the envelope was defendant's name, address and the date and time of the arrest. Inside that plastic envelope was another manila evidence envelope printed by the Evanston Police Department for use in narcotics cases. Lieutenant Kelly opened that envelope and found that it contained three small manila envelopes which had been marked Q-1, Q-2 and Q-3 and which Lieutenant Kelly identified as the same three envelopes which he had recovered from the ground from where defendant was standing immediately after defendant was placed under arrest.

Defendant now argues that Lieutenant Kelly's testimony as to the delivery of the envelopes to the Chicago Police Department Crime Laboratory by Officer Hile and the laboratory reports were hearsay. While this testimony was hearsay, it was unobjected to in the trial court by defense counsel. Defense counsel's failure to object or to cross-examine Lieutenant Kelly regarding this testimony constitutes a waiver, and the argument cannot now be raised for the first time on appeal. (People v. Williams, 9 Ill. App. 3d 466, 292 N.E.2d 204.) In the absence of any objection of defendant at trial, this testimony was sufficient to establish that the substance in question was marijuana. People v. Robinson, 19 Ill. App. 3d 680, 312 N.E.2d 320.



Defendant also argues that if Lieutenant Kelly's testimony be taken as true, the evidence is insufficient to show a continuing chain of possession. At trial defense counsel did not make any objection or any argument which would have indicated that he was challenging the chain of custody. Lieutenant Kelly testified and without objection in open court opened a sealed envelope from the Chicago Police Department containing an inventory receipt, a laboratory report, and a sealed plastic envelope. Lieutenant Kelly identified that envelope as the plastic envelope which he had seen at the Evanston Police Department on May 13, 1972, after arresting the defendant and which has the defendant's name and date and time of arrest. Inside that envelope Lieutenant Kelly recovered a manila envelope in which there were three small manila envelopes which Lieutenant Kelly identified as the same three envelopes he had found lying on the ground where defendant was standing immediately after defendant was placed under arrest. All this testimony went into evidence without any objection by defense counsel. Defendant's only objection at trial was that there was no showing of a connection between these envelopes and the defendant. This evidence received without objection was sufficient to establish that the three manila envelopes found on the ground next to where defendant had been standing immediately after defendant was placed under arrest was the same substance transmitted to and tested by the police chemist and found to contain marijuana.

Defendant's final contention is that he did not knowingly and understandingly waive his right to a trial by jury. Here, the record reflects that when defendant's case was called, defense counsel in defendant's presence replied, "Jury is waived." In People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397, the Illinois Supreme Court held that a defendant normally speaks through his attorney and that by permitting his attorney in his presence and without objection to waive his right to a trial by jury, the defendant acquiesces and then is bound by his attorney's conduct.

Defendant now seeks to avoid the doctrine announced in Sailor by arguing that counsel had been appointed the day of trial and the record does not show that he had a sufficient period of time within which to confer with the defendant. In People v. Murrell, et al., 60 Ill. 2d 287, ____ N.E.2d ____ (No. 46849, 46850, March 24, 1975), the Illinois Supreme Court rejected this identical contention holding:

"We also cannot accept the defendant's argument that Sailor should not be followed where counsel was not appointed until the time of trial and the record does not indicate that the newly appointed counsel had an adequate opportunity to confer with the defendant. This argument is again asking the court to presume from a silent record that the waiver was not knowingly and intelligently made."

In the case at bar, the record shows that defense counsel was appointed on the day of trial and the case was then passed while he conferred with his client. When the case was recalled, defense counsel in defendant's presence stated that a jury and trial were waived. This statement was sufficient to constitute a valid jury waiver binding upon defendant.

For the foregoing reasons, the judgment is affirmed.

JUDGMENT AFFIRMED



291A. 1032



59890

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
RICKY BELL, CHARLES DIXON and	)	HON. JOHN F. HECHINGER,
GREGORY DIXON,	)	Presiding
)	
Defendants-Appellants.)	

Mr. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendants were found guilty at a bench trial of armed robbery and attempt rape. Ricky Bell was given concurrent sentences of five to eight years for armed robbery and two to six years for attempt rape. Charles and Gregory Dixon were given concurrent sentences of four to eight years for armed robbery and one to six years for attempt rape. Following a pretrial hearing, the court denied defendants' motion to suppress the identification testimony of Parthenia Harbour, the prosecutrix, and her brother-in-law, Robert Cherry. Defendants contend on appeal that they were not proven guilty beyond a reasonable doubt because the identification testimony was not positive and credible. The following pertinent facts were adduced during the proceedings.

Parthenia Harbour testified that on January 3, 1973, at about 6:00 P.M., she returned from work to her apartment building located at 4508 West West End in Chicago where she lived with her sister and brother-in-law. When she entered the building's vestibule, which is a small room approximately 4 feet long, 5 feet wide, and 7 feet high, three black youths accosted her. They turned Parthenia Harbour around to face them as she started to ascend the stairs to her second floor apartment. Under the illumination of a single light bulb from the ceiling, Parthenia Harbour was able to see the faces of the youths for about one minute. She looked directly in the eyes of each youth for about four or five seconds. One of the youths then unscrewed the light bulb eliminating the



only source of inside light in the vestibule. A watch and \$8 was taken from Parthenia Harbour. She was forced to the floor with her back down facing upward. Miss Harbour's boots and left pant leg were removed by two of the youths. The third youth acted as a lookout, the front door of the vestibule being glass. When Miss Harbour told them that she was 17 years of age to deter their action, one of the youths said, "You are a virgin, huh, this is going to be good." A gun was passed among the youths during the time they were accosting Miss Harbour in the vestibule.

Robert Cherry, Parthenia Harbour's brother-in-law, testified that he was returning home from work at about 6:10 P.M. the same evening. Street lights, 10 feet from the vestibule entrance, illuminated the area in front of the apartment building. As Cherry departed from a friend's automobile outside the building, Cherry observed one young man walk from the vestibule door. When Cherry was approximately 8 feet from the building, he saw a second youth leave the vestibule. When Cherry was about to enter the building, a third youth pushed the vestibule door into Cherry, forcing him to step back, while the youth hurriedly walked away.

Once the police arrived, both Cherry and Miss Harbour gave a description of the three assailants. They were described as three teenage negroes, two darker than one, between 5 feet 8 inches and 5 feet 9 inches tall, 160 to 170 pounds in weight, and wearing dark clothes and hats. All three youths were described as wearing "natural" style haircuts. Cherry testified that he thought he had previously seen these three youths in the neighborhood, but did not so inform the investigating officers on the evening Miss Harbour was attacked.

On January 4, 1973, Cherry noticed three youths standing on the corner under a street light across from his apartment building. Cherry called the police and told the investigating officers that he recognized the teenagers on the corner as the same three who



fled from the vestibule on the previous evening. Cherry testified that he had an unobstructed view of the three youths on the corner from a distance of approximately 90 feet for about 20 minutes.

On January 7, 1973, a shooting incident occurred at 107 North Kilbourn. Robert Cherry and Parthenia Harbour were in the vicinity and they recognized the youths involved in the incident as the same three who accosted Miss Harbour on January 3, 1973. Robert Cherry told Miss Harbour, "Them's the guys." Later that same day, Robert Cherry and Parthenia Harbour were taken to the 15th District Police Station to view a line-up. Cherry and Miss Harbour, each alone while they viewed the line-up, identified Ricky Bell and Gregory Dixon as Miss Harbour's assailants. Cherry testified that Bell and Dixon were among the three youths he saw on the corner on the evening of January 4, 1973. Before Cherry viewed the line-up, the police told Cherry that the men who robbed his sister would be in the line-up. However, the police did not offer any suggestions when Cherry or Miss Harbour faced the suspects and identified the defendants at the line-up. On February 1, 1973, Charles Dixon, the youth shot on North Kilbourn on January 7, 1973, was identified as the third assailant at a court hearing in Branch 43.

Officers Zulkowski and Forte arrived at Cherry's apartment after Parthenia Harbour had been attacked. Although the police officers had been given a general description of the assailants' height, weight, color, race, sex, and clothing, Officer Zulkowski testified that no flash message was transmitted over the police radio because he thought the description was too vague.

Donald Moriarity, an investigator with the Chicago Police Department, testified that he spoke with Robert Cherry and Parthenia Harbour at about 12:30 P.M. on January 7, 1973, following the shooting of Charles Dixon at 107 North Kilbourn. Cherry identified the wounded Dixon as he was being carried on a stretcher to a police squadrol to be one of the men who had robbed Miss Harbour.

Moriarity asked Robert Cherry and Parthenia Harbour to attend a line-up at the 15th District Station. Moriarity testified that no photographs, gestures, or any other kind of suggestive technique was employed by the police before or during the line-up.

Defendants testified in their own behalf. Ricky Bell initially stated that he was at the Country Kitchen Restaurant at the time of the robbery and attempt rape. He then testified that he was at the restaurant from 2:30 A.M. of one day until 12:00 noon of the next day, but he was confused as to the actual dates of those days. He finally stated that on the night before the incident he was at the restaurant, went to the Dixon apartment with the Dixon brothers in the afternoon hours to sleep, and then awoke at about 8:00 P.M. to return to the restaurant. Bell denied that he ever attempted to rape or rob Parthenia Harbour.

Charles Dixon testified that he arrived at his apartment on the afternoon of January 3, 1973, at about 2:00 P.M. He stated that he left the apartment with his brother Gregory and Ricky Bell at about 9:00 P.M. It was his routine to spend his evenings at the Country Kitchen Restaurant and sleep during the day. Charles Dixon denied that he ever robbed or attempted to rape Parthenia Harbour.

Gregory Dixon testified that he arrived at his apartment at about 4:00 P.M. on January 3, 1973. He stated that he left the apartment with his brother Charles and Ricky Bell at about 8:30 P.M. Gregory Dixon denied that he ever robbed or attempted to rape Parthenia Harbour.

Defendants contend that they were not proven guilty beyond a reasonable doubt because the identification testimony was not positive or credible. They argue that Parthenia Harbour and Robert Cherry did not have sufficient opportunity to form a reliable description; that the descriptions given were too general and uncertain; that a discrepancy existed as to the height of one

defendant, Gregory Dixon; and that Robert Cherry improperly influenced Miss Harbour's identification testimony.

Identifications which are vague, doubtful, or uncertain will not support a conviction. (People v. O'Hara, 332 Ill. 436, 458-459, 163 N.E. 804, 812.) However, the testimony of one witness, who had ample opportunity to form a positive identification, is sufficient to convict even though such testimony is contradicted by those accused. (People v. Stringer, 52 Ill. 2d 564, 289 N.E.2d 631.) The totality of the facts and circumstances in each case must be examined in order to determine the reliability of the complaining witness' identification testimony. (Simmons v. United States, 390 U.S. 377; Neil v. Biggers, 409 U.S. 188; People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462; People v. Williams, 60 Ill. 2d 1, 322 N.E.2d 819.) The Neil v. Biggers case utilizes several factors which may be considered in evaluating identification evidence. The factors include: "*** the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." (Neil v. Biggers, 409 U.S. 188, 199; see People v. Bricker, 23 Ill. App. 3d 394, 319 N.E.2d 255.) Applying the criteria suggested by Neil, we find that the record does not indicate a substantial likelihood of misidentification.

The testimony of Parthenia Harbour and Robert Cherry was both positive and independent in origin. Miss Harbour had the opportunity to directly face her assailants in a small, well-lighted room for a period of at least four or five seconds. Miss Harbour testified that she got a "good look" at the three youths and noticed other facial features for about one minute. Moreover, as Robert Cherry approached the front of the apartment building, he clearly saw all three youths walk from the vestibule door under the direct light of street lamps from various points inside a distance of

only 8 feet. On the following evening, Cherry closely observed the defendants standing on a street corner across from his apartment building. He immediately reported to the police that he sighted the youths who had assaulted his sister-in-law. Four days later, Cherry again identified the defendants as Miss Harbour's assailants when they were involved in a shooting incident in the neighborhood. Finally, Parthenia Harbour and Robert Cherry identified the defendants as the assailants in a police line-up and at a court hearing. Both Robert Cherry and Parthenia Harbour had ample opportunity to observe the assailants. Their testimony was unequivocal and unimpeached.

The initial description given to the police was not too vague or uncertain. The defendants' weight, height, race, sex, age, style of haircut, and clothing were described by Miss Harbour and corroborated by Robert Cherry. Precise accuracy in the description is not necessary when the identification is positive. (People v. Jackson, 95 Ill. App. 2d 28, 237 N.E.2d 858; People v. Williamson, 78 Ill. App. 2d 90, 223 N.E.2d 453.) The complaining witness' testimony was based upon their firsthand observations. Their ability to recognize and identify the defendants is unrelated to their ability to precisely articulate physical characteristics. Moreover, the only discrepancy in Parthenia Harbour's description was the height of one defendant, Gregory Dixon. Miss Harbour stated that her assailants were between 5 feet 8 inches tall and 5 feet 9 inches tall. Defendant Ricky Bell is 5 feet 9 inches tall, while defendant Charles Dixon is 5 feet 10 inches tall. Defendant Gregory Dixon is 6 feet 1 inch tall. The fact that Miss Harbour could not precisely determine the height of her third assailant does not, as a matter of law, render her identification unreliable or unworthy of belief. Minor omissions or discrepancies in description do not necessarily affect the validity of an identification, although they may affect the weight given to the evidence. (People v. Bennett, 9 Ill. App. 3d 1021, 293 N.E.2d 687.) Questions of weight and credibility are for the trier of fact. In light of the

corroborating positive identifications of Parthenia Harbour and Robert Cherry, the trial court's evaluation of the evidence will not be disturbed. People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378.

Defendants lastly argue that Robert Cherry overly influenced Miss Harbour's identification testimony by informing her that the youths involved in the shooting incident were her assailants. However, the trial court found that Miss Harbour's identification of the defendants was in no way coerced by the police or Cherry. Parthenia Harbour had ample opportunity for identification independent of improper influences. Any suggestive comment made to Miss Harbour by Robert Cherry is a matter of weight and not competency. (People v. Napper, 78 Ill. App. 2d 451, 223 N.E.2d 194.) We find that the trial court's ruling on the question was based on sufficient evidence. In conclusion, the entire record indicates that defendants were proven guilty beyond a reasonable doubt.

For these reasons, the judgment is affirmed.

JUDGMENT AFFIRMED

EGAN and SIMON, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
CLARENCE E. FIELDS (Impleaded)	)	HONORABLE
	)	FRED G. SURIA, JR.
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIRST DIVISION).

Before Burke, P.J., Egan and Simon, J.J.

On July 26, 1972, Clarence E. Fields, defendant, was charged in two separate complaints with the offense of armed robbery of Jack Wright and Felton Carter in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch.38, par. 18-2). A preliminary hearing was held on September 12, 1972, on both complaints and defendant was bound over to the grand jury. On December 4, 1972, defendant and Albert King were charged by indictment with the offense of armed robbery of Bobby Jackson and Felton Carter in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch.38, par.18-2). In a bench trial, defendant was tried separately, found guilty of armed robbery of Bobby Jackson and Felton Carter, as charged in the indictment, and sentenced to a term of not less than 4 years and not more than 6 years in the penitentiary on each conviction, said sentences to run concurrently, less time already served.

On appeal defendant contends that he was denied his rights under section 7 article I of the constitution of 1970, when he was incarcerated for 48 days without a preliminary hearing.

On July 9, 1973, the day the trial began, defendant filed a motion to quash the indictment, in which he alleged he was arrested on July 26, 1972. on complaint charging the crime of armed robbery of Jack Wright, Bobby Jackson and Felton Carter; that on September 12, 1972, defendant was brought before the trial court "for preliminary hearing on the aforementioned charges"; that neither at that time nor at any other time was defendant given "a preliminary



hearing on the charge of Armed Robbery alleged to have been committed on and from the person of Bobby Jackson"; and that defendant was indicted by the November 1972 grand jury, Indictment No. 72-3144, charging him with the offense of armed robbery on and from the person of Bobby Jackson. Defendant prayed that the indictment charging him with the armed robbery of Bobby Jackson be dismissed.

The trial court, in denying the motion, stated that the case was one in which there was a common course of conduct involving several victims; that defendant was advised as to that conduct; that although Bobby Jackson was not available for the preliminary hearing he did testify before the grand jury; that "there would be no substantial detriment to the defendant"; and that under the circumstances the State did not violate any constitutional rights of defendant. The motion to quash the indictment and the argument thereon did not refer to the two complaints for armed robbery filed on July 26, 1972, or the lapse of 48 days between defendant's arrest on July 26, 1972, and the preliminary hearing on the two complaints held on September 12, 1972.

Defendant concedes that his motion to quash the indictment was directed to the failure to hold a preliminary hearing as to the charge of armed robbery of Bobby Jackson when the thrust should have been the claim of "unreasonable delay between the time of the arrest on July 26, 1972, and the preliminary hearing on September 12, 1972." Defendant argues that the court should overlook this error and pass on the issue under Supreme Court Rule 615, which provides that "plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Defendant contends under section 7 of article I of the constitution of 1970 "a basic constitutional right was violated by the unreasonably long delay which left Defendant imprisoned for 48 days without a determination of probable cause"; that "the right to a prompt preliminary hearing is a fundamental right like the right to counsel or the right to confront your accusers in open court"; and that therefore the judgments should be reversed.

There was a lapse of 48 days between the arrest and the preliminary hearing. However, 32 days of the delay were the result of a motion of the defendant for a postponement. In view of this fact, there is a question as to whether there was any violation of section 7 of article I of the 1970 constitution, which provides that there be a prompt hearing to determine probable cause. Even if under these circumstances the delay is viewed as a violation of that constitutional provision, it does not appear that the dismissal of the charge is the appropriate sanction. In People v. Hendrix (1973), 54 Ill.2d 165, 295 N.E. 2d 724, the court held that the constitutional provision does not provide a grant of immunity from prosecution as a sanction for its violation. The court further stated that it would not "make sense" to permit the dismissal of a pending charge as a sanction for such violation, only to be followed by a re-charge and a re-arrest of the accused on the same charge.

A like conclusion was reached in the recent case of People v. Howell (1975), 60 Ill.2d 117, 324 N.E.2d 403, where there was a 65-day interval between the defendant's arrest and the preliminary hearing. The court held that this delay violated defendant's constitutional right to a prompt hearing but stated that under the Hendrix decision, it was obligated to hold that the error did not invalidate defendant's conviction. The same conclusion must be reached in the case at bar. Here, defendant was charged with the offense of armed robbery. He was arrested while in the process of robbing patrons of the Holiday Lounge, 1725 West 63rd Street, Chicago, Illinois. The defendant does not raise any question on this appeal with regard to his guilt. Under the holding in Hendrix, the deprivation of defendant's constitutional right to a prompt preliminary hearing, if any such deprivation occurred, did not entitle him to the dismissal of the charges against him. People v. Hunt (1975), ___ Ill. App. 3d ___, ___ N.E.2d ___, General No. 59935, First District opinion filed February 20, 1975.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.





Copy 1

This Book
Does Not
CIRCULATE

RESERVE BOOK

ILL. APP. COURT

UNPUB'D. OPINIONS

Vol. 29 - 3d Series

113678 C.1

This reserve book is NOT transferable and must NOT be taken from the library ~~on any other~~
~~except by the library~~

You are responsible for the return of this book.

DATE	NAME		
8-11	E. Richman		
12-18	T. Tulane		
2/8/78	V. Dandridge		
3/31/78	S. Carlson	329	7717
	W. Herigodt	236	8525
1-21-79	S. Bradie	726	0440
6/2/80	P. Hooper	329	5427
	M. FAHRENBAACH	726	8450

ILL. APP. CT. UNPUB'D. OPINIONS
Vol. 29 - 3d Series
113678

Copy 1



